

90-479^①

No. _____

Supreme Court, U.S.

FILED

SEP 12 1990

JOSEPH F. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1990

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife;
ROBERTA NELSON; BOBBY D. ADEE and JOHNANN ADEE,
his wife; HOWARD W. ROBERTSON and PAULINE
ROBERTSON, his wife; JOHNANN ADEE, as Trustee for
SHARON ADEE and DOWLEN ADEE; J. CASPER HEIMANN,
as Trustee for RANDALL LYNN HEIMANN, deceased, JAY DEE
HEIMANN, GENE ALVIN HEIMANN and RUSSELL GARY
HEIMANN; PAULINE ROBERTSON, as Trustee for VAN
HOWARD ROBERTSON; DEANA SHUGART,
a married woman dealing in her sole and separate estate;
and JOHNANN ADEE, in her capacity as Personal
Representative of THE ESTATE OF FRED P. HEIMANN, deceased,
Petitioners,

v.

AMOCO PRODUCTION COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STEVEN L. TUCKER
P.O. Box 2228
Santa Fe, New Mexico
87504-2228
Counsel for Petitioners

September 10, 1990

JERRY WERTHEIM
215 Lincoln Ave.
P.O. Box 2228
Santa Fe, New Mexico
87501
(505) 982-0011
Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. For determining whether an administrative agency "acts in a judicial capacity" for purposes of applying federal rules of issue preclusion, do this Court's decisions in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) and its progeny state the applicable standard or, as the court of appeals held, is the issue to be decided under general principles of state law?

2. Does the Full Faith and Credit Act, 28 U.S.C. § 1738, require a federal court to give collateral estoppel effect to actions of state administrative agencies acting in a legislative capacity, simply because those actions were affirmed after traditional appellate review in a state court?

3. Is the lower court's decision, which allows fact-finding by an administrative agency to foreclose the exercise of one's Seventh Amendment right to a jury trial in federal court on a matter involving only private rights, inconsistent with *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES*	ii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10

A. In Applying The Federal Common Law Of Issue Preclusion, The Tenth Circuit And Other Lower Courts Have Not Followed *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) And Its Progeny Holding That The “Final Act” Of The Administrative Agency Determines Whether It Acts In A Legislative Or Judicial Capacity 10

B. Whether Legislative Determinations By State Administrative Agencies, Even After Affirmance By State Appellate Courts, Are “Judicial Proceedings Of Any Court” Within The Meaning Of 28 U.S.C. § 1738 Is An Important Question Which Was Left Open In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), And Should Be Decided Now 17

C. This Court Should Insure The Uniform Application Of Seventh Amendment Principles By Preventing The Lower Courts From Allowing States Greater Power To Relegate The Adjudication Of Disputes Involving Only Private Rights To Non-Juries Than This Court Allowed Congress In *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) 19

CONCLUSION 24

*Amoco Production Company is a wholly-owned subsidiary of Amoco Corporation (formerly Standard Oil Company of Indiana).

TABLE OF CONTENTS (continued)

APPENDIX:

- A Opinion of the Court of Appeals, dated May 24, 1990.
- B Order of the New Mexico Oil Conservation Commission, dated August 14, 1980.
- C Order of the New Mexico Oil Conservation Commission, dated January 23, 1981.
- D Memorandum Decision of the New Mexico District Court, dated April 5, 1982.
- E Decision of the New Mexico Supreme Court, dated November 10, 1983 (unpublished).
- F Findings of Fact and Conclusions of Law Entered by the United States District Court for the District of New Mexico, dated February 9, 1988.
- G Order amending Opinion and otherwise denying Petition for Rehearing and Suggestion of Rehearing En Banc, dated May 24, 1990.
- H Order denying Petitioners' Petition for Rehearing from the amended Opinion, dated June 12, 1990.

TABLE OF CASES AND AUTHORITIES

	<i>Page</i>
CASES:	
<i>Amoco Production Co. v. Heimann</i> , 904 F.2d 1405 (10th Cir. 1990)	1
<i>Amoco Production Co. v. Jacobs</i> , 746 F.2d 1394 (10th Cir. 1984)	8
<i>Atlas Roofing Co. v. Occupational Safety & Health Review Commission</i> , 430 U.S. 442 (1977)	22
<i>Buckhalter v. Pepsi-Cola General Bottlers, Inc.</i> , 820 F.2d 892 (7th Cir. 1987)	15
<i>Byrd v. Blue Ridge Rural Electric Cooperative, Inc.</i> , 356 U.S. 525 (1958)	20, 23
<i>Candelario v. Postmaster General</i> , 906 F.2d 798 (2d Cir. 1990)	18
<i>Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry</i> , ___ U.S. ___ 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990)	21, 22
<i>Continental Oil Co. v. Oil Conservation Commission</i> , 70 N.M. 310, 373 P.2d 809 (1962)	6
<i>District Court of Appeals v. Feldman</i> , 460 U.S. 462 (1983)	14

CASES (Continued)

<i>Granfinanciera, S.A. v. Nordberg,</i> ___ U.S. ___, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)	i, ii, 9, 20, 21, 23
<i>Herron v. Southern Pacific Co.,</i> 283 U.S. 91 (1931)	23
<i>Kirkland v. City of Peekskill,</i> 828 F.2d 104 (2d Cir. 1987)	10
<i>Kremer v. Chemical Construction Corp.,</i> 456 U.S. 461 (1982)	ii, 10, 11, 15, 17, 18
<i>Mack v. South Bay Beer Distributors, Inc.,</i> 798 F.2d 1279 (9th Cir. 1986)	16
<i>Marrese v. American Academy of Orthopaedic Surgeons,</i> 470 U.S. 373 (1985)	18
<i>Meeker v. Ambassador Oil Corp.,</i> 375 U.S. 160 (1963)	22
<i>Nelson v. Jefferson County,</i> 863 F.2d 18 (6th Cir. 1988), <i>cert. denied</i> , ___ U.S. ___, 110 S.Ct. 76, 107 L.Ed.2d 42 (1989)	16
<i>New Orleans Public Service, Inc. v. Council of City of New Orleans,</i> ___ U.S. ___, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989)	14
<i>Parklane Hosiery Co. v. Shore,</i> 439 U.S. 322 (1979)	21

CASES (Continued)

<i>Phillips Petroleum Co. v. Peterson</i> , 218 F.2d 926 (10th Cir. 1954), cert. denied, 349 U.S. 947 (1955)	3
<i>Prentis v. Atlantic Coast Line Co.</i> , 211 U.S. 210 (1908) . . . i, ii, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19	
<i>Public Service Co. of Northern Illinois v. Corboy</i> , 250 U.S. 153 (1919)	14, 18, 19
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	12, 14, 19
<i>Rutter & Wilbanks Corp. v. Oil Conservation Commission</i> , 87 N.M. 286, 532 P.2d 582 (1975)	6
<i>Simler v. Conner</i> , 372 U.S. 221 (1963)	20
<i>St. Bartholomew's Church v. City of New York</i> , 728 F.Supp. 958 (S.D.N.Y. 1989)	10
<i>United States v. Utah Construction & Mining Co.</i> , 384 U.S. 394 (1966)	10, 11, 15, 16
<i>University of Tennessee v. Elliott</i> , 478 U.S. 788 (1986)	10, 11, 15, 17
<i>West Coast Truck Lines, Inc. v. American Industries, Inc.</i> , 893 F.2d 229 (9th Cir. 1990)	15, 16
<i>Yancy v. McDevitt</i> , 802 F.2d 1025 (8th Cir. 1986)	15

MISCELLANEOUS:

Act of March 2, 1793, ch. 22, §5, 1 Stat. 334	2, 12, 19
4 K. Davis, <i>Administrative Law Treatise</i> § 21.2, p. 49 (2d ed. 1983)	16
Section 83, <i>Restatement (Second) of Judgments</i>	15
Section 70-2-25, NMSA 1978	6
28 U.S.C. § 1254	1
28 U.S.C. § 1332	7
28 U.S.C. § 1738	ii, 2, 17, 18, 19
28 U.S.C. § 2283	2, 12, 14, 19
United States Constitution, Amendment 7	1, 9, 20, 21, 22, 23
United States Constitution, Article III	20, 22, 23

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at *Amoco Production Co. v. Heimann*, 904 F.2d 1405 (10th Cir. 1990), and attached as Appendix A.

JURISDICTION

The original opinion of the Tenth Circuit was dated and entered on April 6, 1990. Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on April 20, 1990. The Tenth Circuit amended its opinion on May 24, 1990 (Appendix A), but in all other respects denied the motion for rehearing. (Appendix G). Petitioners filed a second Petition for Rehearing from the amended opinion on June 7, 1990. The Tenth Circuit denied that Petition for Rehearing on June 12, 1990. (Appendix H).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provision and statutes are involved in this case:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment 7.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

STATEMENT OF THE CASE

Petitioners, the Heimanns, are a family of cattle ranchers living and conducting their operations in New Mexico. They own approximately 48,000 acres of land in which they hold mineral rights. Underlying Petitioners' lands are large reserves of carbon dioxide (CO₂).

Respondent, Amoco Production Company ("Amoco"), engages in the production of oil. At the material times, it had interests in certain oilfields in West Texas and desired to produce CO₂ in New Mexico, to transport it by pipeline to those oilfields, and to use it to enhance oil recovery there.

Between 1971 and 1974, the Heimanns and Amoco entered into three mineral leases by which Amoco was granted the authority to produce CO₂ from the Heimanns' lands. Amoco entered into similar leases with over one thousand other landowners in the

adjoining areas. The Heimanns' leases with Amoco, and many of the other leases, contained a "unitization clause" which provided, in effect, that Amoco had the authority to unitize the Heimanns' leases with other leases, subject to the approval of "any governmental authority." To "unitize" is to operate a collection of leases as if it were a single lease. Through an implied covenant arising from a mineral lease, the common law imposes upon the lessee a duty of good faith in favor of the lessor, requiring lessee to take into consideration the effect on the lessor's interest in the exercise of the authority to unitize. (Appendix A, pp. 6-10). *See also, Phillips Petroleum Co. v. Peterson*, 218 F.2d 926 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955).

In the late 1970's, Amoco desired to unitize the Heimanns' leases with other leases. To that end, it formed a proposed unit which it called the "Bravo Dome" unit, encompassing over 1,800 individual tracts or properties (Amoco's Brief in Chief, p. 12, n. 6) and consisting of a total of over 1,100,000 acres. This unit was probably the largest unit ever formed in the United States. (Appendix C, p. 4).

The Heimanns' leases required Amoco to pay them according to the actual production from their leases. Although Amoco knew how to draw a plan for operating the unit, called a "unit agreement," which accounted to each lessor in the unit for the actual production from his own lease, Amoco unilaterally drew the Bravo Dome unit agreement to account to each lessor according to the number of acres in each lessor's lease compared to the total mineral acres in the whole unit. In other words, Amoco decided to pay the lessors on the basis of acreage rather than production.

Amoco implemented its "unit agreement" in two ways: (1) it approached individual lessors in the unit asking them to ratify it, and (2) it sought approval of it from several governmental agencies. Some lessors did ratify the unit agreement. Others, including the Heimanns, did not.

In 1978, to obtain the agency approval called for under the leases, Amoco filed a request for "preliminary approval" of its proposed unit agreement with the New Mexico Oil Conservation Commission ("OCC"). (Exhibit 17). That request was not sent to the Heimanns or other lessors. On July 21, 1980, the OCC held a

one-day hearing on the request and, on August 14, 1980, entered an Order approving the Bravo Dome unit agreement. In relevant part, the Order provided,

(2) That the plan contained in said unit agreement for the development and operation of the unit area is hereby *approved in principle as a proper conservation measure*; provided, however, that notwithstanding any of the provisions contained in said unit agreement, this approval shall not be considered as waiving or relinquishing, in any manner, any right, duty, or obligation which is now, or may hereafter be, vested in the Division to supervise and control operations for the exploration and development of any lands committed to the unit and production of carbon dioxide gas therefrom.

....

(4) That *all plans* of development and operation and *all expansions or contractions* of the unit area *shall be submitted* to the Director of the Oil Conservation Division *for approval*.

....

(5) That *jurisdiction* of this cause *is retained* for the entry of such *further orders* as the Commission may deem necessary.

(Appendix B, p. 2). (Emphasis added).

The OCC also found that approval of the unit agreement "should promote the prevention of waste and the protection of correlative rights." (Appendix B, p. 2).

A few days later, a group of 238 lessors, including the Heimanns, filed an application for rehearing on the OCC order. Pursuant to that application, another one-day hearing was held in October of 1980. At that proceeding, the lessors were represented by an attorney, evidence was admitted and witnesses were examined and cross-examined.

In January of 1981, the OCC entered a second order (Appendix C) which contained the following pertinent findings:

(7) That on October 9, 1980, a rehearing was held in Case No. 6967 for the purpose of permitting all interested parties to appear and present evidence relating to this matter,

(13) That the developed acreage within the proposed unit is very small when compared to the total unit area and when viewed as a whole, *the unit must be considered to be an exploratory unit.*

....

(16) That there was *no evidence* upon which to base a finding that either [of two proposed methods of distribution of production or proceeds from production] was clearly superior upon its own merits in this case *at this time.*

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate *at this time.*

....

(22) That this is the largest unit ever proposed in the State of New Mexico, and perhaps the United States.

(23) That there is no other carbon dioxide gas unit in the State.

(24) That *the Commission has no experience* with the long term operation of either a unit of this size or of a unit for the development and production of carbon dioxide gas.

(25) That the evidence presented in this case establishes that the unit agreement *at least initially* provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

(26) That the *current* availability of reservoir *data* in this large exploratory unit *does not now permit the presentation of evidence* of the finding that the unit agreement provides *for the long term development of the unit area* in a method which will prevent waste and which is fair to the owners of interests therein.

(27) That *further development* within the unit area *should provide the data* upon which such determinations could, from time to time, be made.

(28) That the Commission is empowered and has the duty with respect to unit agreements to do whatever may be reasonably necessary to prevent waste and protect correlative rights.

(29) That the *Commission* may and should *exercise continuing jurisdiction* over the unit relative to all matters given it by law and take such actions as may, *in the future*, be required to *prevent waste and protect correlative rights* therein.

(Appendix C, pp. 2-4). (Emphasis added).

Based on those findings, the OCC again approved the Bravo Dome unit agreement subject to the same conditions and qualifications contained in the earlier order and the following additional conditions:

(4) That the *operator* of said unit *shall be required to periodically demonstrate* to the Commission *that its operations* within the unit are resulting in the *prevention of waste and protection of correlative rights on a continuing basis*.

(5) That such demonstration shall take place at a public hearing held *at least every four years* following the effective date of the unit or at such lesser intervals as the Commission may require.

(Appendix C, p. 6). (Emphasis added).

The lessors, including the Heimanns, appealed that January 21, 1981, Order to the New Mexico district court. The OCC was named as a party to the appeal because, under New Mexico law, its decision was one in which it was acting "legislatively", and it was a necessary party because it had a duty to protect and to represent the public interest. *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809, 818-819 (1962). In that appeal, the court sat in a review capacity having only the authority to review the administrative record, and the only issues before it were: (1) had the OCC acted outside of its scope of authority and (2) were its findings supported by substantial evidence? *Rutter & Wilbanks Corp. v. Oil Conservation Commission*, 87 N.M. 286, 532 P.2d 582 (1975). *See also*, Section 70-2-25, NMSA 1978. On the appeal, the district court affirmed the order of the OCC, as did the New Mexico Supreme Court. (Appendices D and E).

In 1984, Amoco began production of carbon dioxide in the Bravo Dome unit, and the Heimanns' leases were among those from which production occurred. Even though the Heimanns had refused to ratify the unit agreement, Amoco treated their leases as if they were included in the unit. Over the next several years, the production from the Heimanns' leases represented 13% of Amoco's total production from the unit. However, Amoco paid them on only 3.6% of the total production from the unit because the Heimanns owned only 3.6% of the mineral acres in the whole unit. The difference between the royalties which would have been payable on actual production from the Heimanns' leases between 1984 and the time of trial and the royalties paid by Amoco during that time was approximately \$3,500,000.00.

In 1984, Amoco sued the Heimanns in the United States District Court for the District of New Mexico seeking a declaratory judgment that their unitization was proper and an injunction against the Heimanns forcing them to ratify the unit agreement. Jurisdiction was based on diversity of citizenship of the parties. 28 U.S.C. § 1332. The Heimanns were all citizens of New Mexico, and Amoco was not. The Heimanns counterclaimed alleging, among other things, that Amoco had breached the implied covenant of good faith arising from the mineral leases, at least from 1984 to the time of trial, by failing and refusing to give appropriate consideration to the interests of the Heimanns in planning and implementing the unit. The Heimanns sought money damages arising from that breach, demanded a jury trial, and sought declaratory relief and an injunction requiring Amoco to withdraw the Heimanns' leases from the unit and to pay them on the actual production from their leases.

In December of 1987, the damage claim was tried for two weeks to a jury. The jury returned a verdict for the Heimanns awarding them \$3,500,000.00 in compensatory damages and \$500,000.00 in punitive damages. Thereafter, the trial court entered a judgment on the jury verdict and findings of fact and conclusions of law in favor of the Heimanns on the equitable issues. (Appendix F). The court found, among other things, that Amoco knew that the CO₂

reserves beneath the Heimanns' properties were superior in reservoir quality and quantity to those reserves lying under most other properties in the unit, withheld that information from them, knew how to draw and to implement a unitization plan which fairly accounted for the differences in quality of reservoir and quantity of reserves as to the different leases, but refused to implement a fair plan in that regard, and acted in bad faith in including the Heimanns' leases within the unit. Accordingly, it ordered Amoco to remove the Heimanns' leases from the unit. The court also held that,

The fact that Amoco obtained the approval of the New Mexico Oil Conservation Division does not establish that the Unitization agreement and the tract participation formula was fair to counterclaimants.

(Appendix F, p. 5).

In making that ruling, the trial court relied heavily on the decision of the Tenth Circuit in *Amoco Production Co. v. Jacobs*, 746 F.2d 1394 (10th Cir. 1984), in which it held that the same approval order from the OCC "does not in and of itself result in the conclusion that [the unit agreement] was valid [and] cannot . . . establish that the area is fair to the owners of interest therein." *Id.*, at 1403.

Amoco appealed both the judgment entered on the jury verdict and the judgment granting declaratory and injunctive relief. On appeal, as at trial, Amoco argued that the approval of the Bravo Dome unit agreement by the OCC was entitled to collateral estoppel effect in the federal lawsuit and conclusively established that Amoco had not breached its common law duty of good faith to the Heimanns. The Heimanns responded with the arguments, among others, that (1) no collateral estoppel effect could be afforded to the OCC approval order because it was acting in a legislative capacity and not a judicial one, and (2) giving preclusive effect to the OCC order would deprive them of their right to a jury trial.

The Tenth Circuit recognized that Amoco did indeed have a common law duty of good faith towards the Heimanns under the unitization clause in the leases. However, it overruled its prior decision in *Amoco Production Co. v. Jacobs*, *supra*, and held that

where a state agency is empowered to rule on the fairness of a unitization plan and finds that such a plan adequately protects the correlative rights of all interested parties, that approval is conclusive in any subsequent litigation between any of the parties on the common law issue of good faith. (Appendix A, p. 13). The court then turned to the question whether the OCC was such an agency. It held that the question turned on whether, under New Mexico law, the OCC acted in a judicial capacity when it granted Amoco's application for approval of the Bravo Dome unit agreement. It based its ruling on the "trial-like procedures" which were available and employed in the one-day hearing on the lessors' application for rehearing before the OCC. (Appendix A, p. 17). Based upon that determination of judicial capacity, the court held that the Heimanns were bound by the OCC's determinations in 1980 and 1981 in connection with Amoco's "preliminary approval" application. Accordingly, the court of appeals reversed both the judgment entered on the jury verdict and the trial court's judgment granting declaratory and injunctive relief and directed that judgment be entered for Amoco.

The Heimanns petitioned for rehearing and suggested rehearing *en banc* because the court had overlooked decisions of this Court such as (1) *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), which state the standard for deciding when an administrative agency was acting in a "legislative," rather than a "judicial," capacity for purposes of issue preclusion and (2) *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), defining the Seventh Amendment's limitations on relegating the adjudication of disputes involving only private rights to non-Article III bodies acting without a jury. In response to that petition, the Tenth Circuit amended its opinion (but not in any way material to this Petition) and otherwise denied the petition for rehearing. (Appendix G). The Heimanns' petition for rehearing from the amended opinion was also denied. (Appendix H).

REASONS FOR GRANTING THE WRIT

A. In Applying The Federal Common Law Of Issue Preclusion, The Tenth Circuit And Other Lower Courts Have Not Followed *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), And Its Progeny Holding That The "Final Act" Of The Administrative Agency Determines Whether It Acts In A Legislative Or Judicial Capacity.

This Court has defined the circumstances under which determinations by administrative agencies will be given preclusive effect in federal court. That test was announced in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), carried forward in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 n. 26 (1982), and stated as follows in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986):

[W]e hold that when a state agency "acting in a judicial capacity. . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *United States v. Utah Construction & Mining Co.*, *supra*, 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

Id., at 799.

This test, which we will call "the *Utah* test," has been recognized to contain three distinct elements, each of which must be met before an administrative determination will be given preclusive effect in a federal court: (1) the agency must have been acting in a judicial capacity, (2) the parties must have an adequate opportunity to litigate the question, and (3) the courts of that particular state would give the agency's determination preclusive effect. *See, Kirkland v. City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987).

Whether the agency is acting in a "judicial capacity" constitutes a federal question as part of the "federal common-law rules of preclusion" announced in *Elliott. Id.*, at 799. *See also, St. Bartholomew's Church v. City of New York*, 728 F.Supp. 958, 965 n. 15 (S.D.N.Y. 1989). If a particular state should also require that the

agency be acting in a judicial capacity in order for its own courts to give preclusive effect to such decisions, then the same question may arise again, under state law, in connection with the third part of the *Utah* test. However, in the first instance, whether an agency is acting in a "judicial capacity" for purposes of applying rules of preclusion in federal courts is an issue of federal law.

Under the facts of *Utah*, *Kremer*, and *Elliott*, there was no need to elaborate in those opinions on what it meant by the requirement of "judicial capacity." That requirement was not a disputed issue in those cases.¹ Accordingly, this Court has not yet explained what "acting in a judicial capacity" means in applying administrative collateral estoppel in federal courts. The Tenth Circuit, in the absence of that guidance, confused that element with the second and third elements of the *Utah* test. It focused on the "trial-like procedures" at the administrative level, a review pertinent to whether the parties had been afforded administrative due process. It also erroneously presumed that it was anticipating the New Mexico Supreme Court's answer on when the OCC was "acting in a judicial capacity". Continuing with that presumption, it concluded, absent such authority in New Mexico, the issue had to be resolved by "consult[ing] general principles of preclusion." (Appendix A, p. 13). However, the Tenth Circuit did not recognize that the issue of when an agency is "acting in a judicial capacity" constitutes a federal question in the first instance and one which has been repeatedly decided by this Court.

¹ In *Utah*, the agency was the Advisory Board of Contract Appeals, which was given the specific statutory authority under the Wunderlich Act to render final and binding adjudications of contract claims between the United States and its contractors. In *Kremer*, the agency was the New York State Division of Human Rights which had the specific New York statutory authority to adjudicate claims of individual discrimination in employment and which found that there was no probable cause to believe that the employee had been the victim of discrimination. In *Elliott*, the agency was a state university acting through an administrative law judge, and it found that the employee had not been the victim of employment discrimination (although the Court did not reach the issue of whether the *Utah* elements had been met). In each of these cases, the proceeding was one which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentiss v. Atlantic Coast Line Co.*, *supra*.

In the absence of guidance, the Tenth Circuit overlooked a long and healthy line of decisions from this Court which articulate the standards for distinguishing a "legislative" proceeding from a "judicial" proceeding. The leading case is *Prentis v. Atlantic Coast Line Co.*, *supra*, in which certain railroads filed suit in federal court seeking to challenge and enjoin the enforcement of rates set by orders of the Virginia State Corporation Commission. The issues were (1) whether the state commission could be enjoined in light of the statute prohibiting injunctions against "proceedings in any court of a State,"² (2) whether the decision of the commission made the legality of the rates *res judicata*, and (3) whether the current challenge was premature. The resolution of the first two questions turned on whether the administrative proceedings were "judicial proceedings" for purposes of interpreting the statute and applying *res judicata*.

In an opinion by Justice Holmes, this Court distinguished between "legislative" and "judicial" proceedings.

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Id. at 226.

He then observed that hearings and investigations into existing factual matters are common to both judicial and legislative proceedings and, therefore, cannot be used to distinguish one from the other.

² The statute at issue, Rev. Stat. § 720, was originally enacted as Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334. *See, Roudebush v. Hartke*, 405 U.S. 15, 20 n. 11 (1972). The current version of that statute is 28 U.S.C § 2283, commonly known as the "Anti-Injunction Act." *Id.*

Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . . *The nature of the final act determines the nature of the previous inquiry.*

Id., at 227. (Emphasis added).

In that case, for example, this Court held that the administrative proceedings were *legislative* even though, as the dissent pointed out, the hearing lasted for several months and consisted of the introduction of evidence by the parties opposing the rates, the examination and cross-examination of witnesses, and the opportunity to object to the introduction of evidence. The procedures which lead up to the final act were indistinguishable from court proceedings. Yet, the nature of the final act determined the nature of the proceedings as "legislative."

Finally, the Court held that an administrative proceeding legislative in nature does not change its character when appealed through the state courts.

And all that we have said would be equally true *if an appeal had been taken to the supreme court of appeals and it had confirmed the rate*. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called.

Id., at 227. (Emphasis added).

Accordingly, it held that the proceedings before the Virginia Corporation Commission were legislative in character and, therefore, not "proceedings in any court" within the meaning of the Anti-Injunction Act. Moreover, since the administrative decision resulted from the Virginia Corporation Commission acting in a legislative capacity rather than a judicial one, the decision was not entitled to res judicata effect on the issues raised. On the issue of prematurity, the Court held that the parties should exhaust any

available state remedies by seeking appellate review in the Virginia courts before invoking the aid of the federal court. However, the Court made clear that if the rate was affirmed by the state appellate courts, the parties could proceed in federal court "without fear of being met by a plea of *res judicata*." *Id.*, at 230.

In this Court's revisiting the same issue over the years, the *Prentis* test for distinguishing "legislative" from "judicial" proceedings has endured.³ Just last year, this Court strongly reaffirmed *Prentis* in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, ___ U.S. ___, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). In that case, this Court held, without dissent, that the *Younger* abstention doctrine did not require a federal court to abstain from hearing a challenge to a state agency decision, even though that administrative decision was on appeal through the state courts. In the majority opinion authored by Justice Scalia, this Court cited and quoted extensively from *Prentis* on the distinction between "legislative" and "judicial" proceedings before administrative agencies (*Id.*, 109 S.Ct. at 2519), after which it said,

We have since reaffirmed both the general mode of analysis of *Prentis* [citing, *District Court of Appeals v. Feldman*, *supra*], and its specific holding that ratemaking is an essentially legislative act. (Citation omitted).

Id., 109 S.Ct. at 2519-2520. See also, the concurring opinion of the Chief Justice citing "our long-standing characterization of the distinction between "judicial" and "legislative" proceedings, see *Prentis v. Atlantic Coast Line Co.*, . . ." *Id.*, 109 S.Ct. at 2521.

³ *District Court of Appeals v. Feldman*, 460 U.S. 462, 476-479 (1983) (determinations in bar admission matters, albeit by a court, are "legislative," not "judicial" proceedings for purpose of appealability to this Court, quoting *Prentis*); *Roudebush v. Hartke*, 405 U.S. 15, 20-23 (1972) (statutory election recount procedure, albeit conducted by a court, is not a proceeding in a court for purposes of the current Anti-Injunction Act, 28 U.S.C. § 2283, quoting *Prentis*); *Public Service Co. of Northern Illinois v. Corboy*, 250 U.S. 153 (1919) (a state court's approval of plans and supervision of construction of a drainage ditch, upon application of property owners, is not a judicial proceeding for purposes of the Anti-Injunction Act, citing *Prentis*).

What is lacking and greatly needed is a decision by this Court wedding the *Prentis* line of cases establishing the "final act" test for distinguishing legislative from judicial proceedings with the element of "acting in a judicial capacity" laid down in cases such as *Utah*, *Kremer*, and *Elliott*.

In the absence of some direction by this Court, lower courts have applied neither the *Prentis* test to the element of "acting in a judicial capacity," nor any other test with consistency or uniformity. In this case, the "final act" of the OCC was (a) a preliminary approval of the unit agreement; (b) a determination that the unit agreement was "fair" at that time (1980-1981) and that more evidence was needed to determine the fairness of the agreement in the future; and (c) an order directing Amoco to demonstrate the fairness of the unit agreement at regular intervals in the future. That "final act" determines this proceeding before the OCC to be legislative. The Tenth Circuit applied the wrong standard, contrary to the *Prentis* test, and reached the opposite conclusion.

The Seventh Circuit has held administrative proceedings to be "judicial" within the meaning of the *Utah* test where they "were conducted in the same manner with the same safeguards (hearings) as a trial in Illinois state court." *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 820 F.2d 892, 896 (7th Cir. 1987).

The Eighth Circuit has turned to Section 83 of the *Restatement (Second) of Judgments* for the proper standards on this question. *Yancy v. McDevitt*, 802 F.2d 1025 (8th Cir. 1986). However, that section expressly applies to "administrative adjudications" and, therefore, necessarily *presupposes* that the agency was acting in a "judicial" capacity. The criteria in that section, we submit, are more properly considered on the second element from *Utah*, that is, whether the litigants had an adequate opportunity to litigate the issue before the agency.

The Ninth Circuit has applied different tests at different times. Compare, *West Coast Truck Lines, Inc. v. American Industries, Inc.*, 893 F.2d 229 (9th Cir. 1990) (agency acted judicially "[b]y conducting a hearing, allowing the parties to present evidence and

ruling on a dispute of law." *Id.*, at 235), with *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) (agency acting judicially "because its decision required it to apply a rule to a specific set of existing facts." *Id.*, at 1283).

The Sixth Circuit has held an agency to be acting judicially "when it hears evidence, gives the parties an opportunity to brief and argue their versions of the facts, and the parties are given an opportunity to seek court review of any adverse findings." *Nelson v. Jefferson County*, 863 F.2d 18, 19 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 76, 107 L.Ed.2d 42 (1989). A leading commentator has stated that

the determination of when [an agency is acting in a judicial capacity for preclusion purposes] cannot always be readily discerned; indeed, that question remains troublesome,

....

4 K. Davis, *Administrative Law Treatise* § 21.2, p. 49 (2d ed. 1983). However, even that commentator has overlooked this Court's *Prentis* line of decisions on this issue.

Of the three elements in the *Utah* test, the most important element is arguably this element of whether the agency is "acting in a judicial capacity." If the proceeding is not adjudicative, then no rights, duties or liabilities arising from past or present facts are being decided. The proceeding might establish a right or duty governing future events but, necessarily, it cannot determine whether those rights or duties are breached in the future. Accordingly, in legislative proceedings, it is irrelevant what opportunities for the presentation of evidence or examination of witnesses might be available. Even more irrelevant is the opportunity for judicial review. Since there is no adjudication at the administrative level, there certainly is no adjudication at the appellate level where the proceeding is one of judicial review on the record without presentation of any evidence. The issue whether rights or duties have been breached is simply not present.

As this Court has said in discussing collateral estoppel,

Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once.

University of Tennessee v. Elliott, *supra*, at 798 n. 6, quoting K. Davis, *Administrative Law Treatise*, § 21.9, p. 78.

While the inner logic of collateral estoppel is unquestionably satisfying, the application of it to legislative proceedings is rather shocking. While the proper application of collateral estoppel prevents one who has received one adjudication from seeking another, the application of that doctrine to legislative proceedings prevents one from receiving any adjudication whatsoever. It bars one from any judicial forum. It defeats substantive rights.

Accordingly, this Court should grant this petition to clarify that its well-established standard for distinguishing "legislative" from "judicial" proceedings applies in determining whether fact-finding in state administrative proceedings are entitled to preclusive effect in federal courts under federal common law rules of issue preclusion.

B. Whether Legislative Determinations By State Administrative Agencies, Even After Affirmance By State Appellate Courts, Are "Judicial Proceedings Of Any Court" Within The Meaning Of 28 U.S.C. § 1738 Is An Important Question Which Was Left Open In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), And Should Be Decided Now.

The Full Faith and Credit Act, 28 U.S.C. § 1738, does not apply to a decision of an administrative agency because such a decision does not arise from "judicial proceedings of any court" within the meaning of that statute. *University of Tennessee v. Elliott*, *supra*. However, in *Kremer v. Chemical Construction Corp.*, *supra*, the Court held that the decision of the New York Supreme Court,

Appellate Division, affirming a decision of the Appeal Board (which had affirmed a decision of the New York Division of Human Rights) was entitled to preclusive effect as a decision of a court within the meaning of 28 U.S.C. § 1738. However, the agency in *Kremer* was unquestionably acting in a "judicial capacity" under any reasonable test. The final act of the administrative body in that case was a determination that there was no probable cause to believe that the employee had been the victim of discrimination. It was a classic example of a judicial proceeding, that is, one which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis, supra*, at 226. See also, *Candelario v. Postmaster General*, 906 F.2d 798 (2d Cir. 1990) (EEOC acts in a judicial capacity in deciding discrimination claims). Therefore, the affirmance of that determination by the state appellate courts was merely a continuation of that judicial proceeding.

Thus, the question left open and needing resolution is whether a decision by an administrative agency acting in a *legislative* capacity, even if affirmed after traditional state court appellate review, arises from "judicial proceedings of any court" within the meaning of 28 U.S.C. § 1738.

The answer to that question is readily apparent from the discussion of the *Prentis* line of cases, although not squarely addressed in any of them. The Court in *Prentis* held, among other things, that for purposes of the Anti-Injunction Act and res judicata, a legislative proceeding retains that character regardless of whether that proceeding moves from an administrative agency into the courts for judicial review. In *Corboy, supra*, the Court held that the proceedings at issue, although they occurred in court, were not "proceedings in any court" within the meaning of that version of the Anti-Injunction Act.

The Anti-Injunction Act involved in *Prentis* and *Corboy* was enacted in 1793, just three years after the Full Faith and Credit Act, 28 U.S.C. § 1738. Both the Anti-Injunction Act and the Full Faith and Credit Act were based on principles of comity. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (Full Faith and Credit Act); *Public Service Co. of Northern Illinois v. Corboy, supra*, at 161 (Anti-Injunction Act). They use

very similar language in referring to proceedings of state courts. The Full Faith and Credit Act of 1790 requires deference to the "judicial proceedings of any court of [a] State." The Anti-Injunction Act of 1793 prohibited federal courts from issuing an injunction to stay "proceedings in any court of a State." It is reasonable to presume, therefore, that Congress had as its intent the same kind of state court proceedings in these two statutes.

With that presumption, the cases interpreting the Anti-Injunction Act become instructive in interpreting the Full Faith and Credit Act. This Court has held in *Prentis* and *Corboy* that proceedings which are legislative in nature, whether they originally occurred before an administrative body and were subject to judicial review or originally took place before a court, are not "proceedings in any court of a State" within the meaning of the Anti-Injunction Act. In interpreting the current Anti-Injunction Act, 28 U.S.C. § 2283, this Court has held that the phrase "proceedings in a State court" in that statute does not encompass "a state court when it is involved in a non-judicial function." *Roudebush v. Hartke*, *supra*, at 21.

Based on these prior decisions, it is clear that legislative proceedings, such as those in this case, which continue into the state appellate courts on judicial review are not "judicial proceedings of any court of [a] State," within the meaning of 28 U.S.C. § 1738. With the extensive use in the states of administrative agencies acting at times in a legislative capacity and at other times in a judicial capacity, the issue here presented takes on equally extensive importance. Accordingly, this petition should be granted to clarify that the Full Faith and Credit Act does not require or even allow a federal court to give collateral estoppel effect to state administrative determinations where those agencies are acting in a legislative capacity.

C. This Court Should Insure The Uniform Application Of Seventh Amendment Principles By Preventing The Lower Courts From Allowing States Greater Power To Relegate The Adjudication Of Disputes Involving Only Private Rights To Non-Juries Than This Court Allowed Congress In *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

The decision of the Tenth Circuit in this case also conflicts with the decisions of this Court, such as *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), defining the limitations imposed by the Seventh Amendment on allowing or recognizing fact-finding by non-juries in disputes involving only private rights. In diversity cases, as in other cases in a federal court, a party's right to a jury trial is protected by the Seventh Amendment, and the parameters of that protection extend to all litigants. *Simler v. Conner*, 372 U.S. 221 (1963); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958).

Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.

Simler v. Conner, supra, at 222 (a diversity case).

In *Granfinanciera*, this Court addressed the narrow circumstances in which Congress can constitutionally direct to non-Article III courts sitting without a jury the adjudication of certain types of legal claims. This case does not involve either Congress or Article III of the United States Constitution. However, in that case, this Court held that where a cause of action is not a "public right" for Article III purposes,

then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power." *Crowell v. Benson*, [285 U.S. 22], at 51 [1932].

And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal.

Id., 109 S.Ct. at 2795.

Beyond peradventure, the Heimanns' claims and the trial court's judgments involve only "private rights." They arise from implied covenants of good faith in the unitization process under the involved mineral leases.

State-law causes of action for breach of contract or warranty are paradigmatic private rights.

Id. at 2798.

Public rights, on the other hand, must at a minimum be created by statute or arise between "the government and others." *Granfinanciera*, *supra*, 109 S.Ct. at 2797. See also, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, ___ U.S. ___, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (Brennan, J., concurring, stating that under *Granfinanciera*, the question of whether a right is a "public right" or a "private right" is a "distinction contingent on the government's role in creating the right." *Id.*, 110 S.Ct. at 1350, n. 3).⁴ Here, the Heimanns alleged no violation of state statutory law and have no statutory cause of action. The State, of course, was not a party to this lawsuit.

⁴ The scope of the Seventh Amendment under the public rights doctrine did not arise in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), where this Court held that a court's determination of issues in an equitable suit could collaterally estop relitigation of the same issues in a subsequent legal action without violating a party's Seventh Amendment right to a jury trial. At issue in both the equitable and legal proceedings in *Parklane* were alleged violations of the federal securities statutes, and this Court did not address the question whether those statutes gave rise to public or private rights within the meaning of the public rights doctrine. Therefore, since this case involves only private rights, the issue presented here was not answered in *Parklane*. Moreover, the historic relationship between equitable and legal actions in the context of the Seventh Amendment as discussed in *Parklane* is clearly distinct from the effect on one's right to a jury trial of giving collateral estoppel effect to administrative determinations.

Moreover, the Heimanns' claim for money damages is clearly a legal, not an equitable, one.⁵

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, supra, 110 S.Ct. at 1344-1345, quoting from *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959).

This Court has consistently recognized that Article III and the Seventh Amendment prevent Congress from delegating to an administrative agency or bankruptcy court a dispute resolution involving *private rights*.

Our prior cases support administrative fact finding in only those situations involving "public rights," *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases as well are not at all implicated.

Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442, 458 (1977).

[Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized in *Atlas Roofing*, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity

⁵ Without question, the Heimanns had a right to a jury trial on the amount and character of damages caused by Amoco's breach of its common law duty of good faith under the three leases. *See, Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963) (*per curiam*) (recognizing a right to a jury trial in an action for money damages for alleged breaches of implied covenants in a mineral lease).

all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. 430 U.S. at 457-458. The Constitution nowhere grants Congress such puissant authority.

Granfinanciera, S.A. v. Nordberg, supra, 109 S.Ct. at 2795.

Under this Court's prior decisions, therefore, the Heimanns have a right to a jury trial on their damage claim, and that right is protected by the Seventh Amendment from predetermination by a forum which does not allow the exercise of that right. Moreover, this protection does not depend on whether the non-jury forum was acting in a legislative capacity, as was the OCC in this case, or a judicial capacity, as was the Bankruptcy Court in *Granfinanciera*. In either case, the Seventh Amendment precludes a federal court from giving such fact-finding collateral estoppel effect, since to do so would necessarily deprive federal court litigants of their right to a jury trial on issues involving only private rights. However, depriving a party of his Seventh Amendment rights by giving preclusive effect to *legislative* fact-finding, as here, is even more intolerable since it forecloses any adjudication whatsoever.

In this case, the Tenth Circuit has essentially given the action of a state administrative agency a preclusive effect beyond that which any federal agency could have under this Court's Seventh Amendment and Article III cases. Although Congress *cannot* constitutionally effect the predetermination of a private-rights damage claim by an administrative body where a jury was unavailable, the Tenth Circuit has erroneously held that a state legislature *can* do so and can thereby foreclose a jury trial in federal court without violating a party's Seventh Amendment rights. Its decision is inconsistent with the prior decisions of this Court and sets a dangerous precedent in the context of the powers of the states to foreclose jury trials in federal courts. Cf., *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, *supra* (states cannot alter a party's Seventh Amendment rights); *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931) (same).

CONCLUSION

Accordingly, the Heimanns respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

STEVEN L. TUCKER
P.O. Box Box 2228
Santa Fe, New Mexico
87504-2228
Counsel for Petitioners

JERRY WERTHEIM
215 Lincoln Ave.
P.O. Box 2228
Santa Fe, New Mexico
87501
(505) 982-0011
Counsel of Record



APPENDIX A

Steven L. Tucker (Jerry Wertheim & Arturo L. Jaramillo, with him on the brief), Jones, Snead, Wertheim, Rodriguez & Wentworth, Santa Fe, New Mexico, for Defendants-Counterclaimants-Appellees and Cross-Appellants.

Charles L. Kaiser and Mary A. Viviano, Davis, Graham & Stubbs, Denver, Colorado, filed an amicus curiae brief for the Rocky Mountain Oil and Gas Association.

Paul A. Cooter, Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, filed an amicus curae brief for the New Mexico Oil and Gas Association.

Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS, District Judge.*

BALDOCK, Circuit Judge.

Amoco Production Company (Amoco) appeals from a \$4 million judgment arising out of its unitization of a carbon dioxide field in northeastern New Mexico. Amoco argues, *inter alia*, that the district court 1) misinstructed the jury on an oil or gas lessee's duty of good faith, and 2) improperly failed to accord collateral estoppel effect to the findings of the New Mexico Oil Conservation Commission (OCC). Our jurisdiction over this diversity case arises under 28 U.S.C. § 1291. We hold that 1) a good faith inquiry into an oil and gas lessee's conduct is unnecessary where the unitization previously was approved by an independent state agency which passes on the fairness of the participation formula, such as the OCC, and 2) the OCC's approval of the unitization plan in this case has collateral estoppel effect upon the appellees' challenge to the unit's allocation formula. Accordingly, we reverse.

I.

Defendants-Counterclaimants-Appellees (the Heimanns) are a family of ranchers who have lived in northeastern New Mexico

*The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

since the early part of this century. The Heimanns own 48,120 acres of ranch land in Union, Quay and Harding Counties, New Mexico. Between 1971 and 1974, the Heimanns executed three carbon dioxide (CO₂) and mineral leases with Amoco. Each of these three leases contained a unitization clause which granted Amoco the right to unitize the Heimanns' mineral interests with other lands in the area, subject to approval "by any governmental authority." The leases granted the Heimanns a one-eighth royalty of the net proceeds received from all oil, gas or CO₂ produced on their lands.

In the late 1970's, Amoco embarked upon a plan to pipe CO₂ from northern New Mexico to its west Texas oil fields in order to enhance recovery there. Amoco therefore sought to unitize the mineral rights to approximately 1,174,225 acres of land in Harding, Union and Quay counties, including the Heimanns' land.¹ The proposed agreement for the "Bravo Dome" unit allocated royalties on the basis of "surface acreage;" production was allocated according to the total surface areas contained in each tract. Amoco sought approval of the Bravo Dome unit from the OCC.² The Commission found that "approval of the proposed unit agreement should promote the preventions of waste and the protection of correlative rights within the unit area" and consequently approved the unit agreement. Amoco Prod. Co., No. R-6446, unpub. order at 1 (N.M. Oil. Conservation Comm'n Aug. 14 1980).

Together with other opponents of the Bravo Dome unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns and other opponents of the unit appeared before the OCC and presented evidence that the per-acre participation formula did not protect their correlative rights. The OCC found in pertinent part:

¹ Amoco held a 74 % working interest in the unitized lands.

² Although its name might suggest otherwise, the New Mexico Oil Conservation Commission and its parent, the Oil Conservation Division, maintain jurisdiction over carbon dioxide resources as well as hydrocarbons. N.M. Stat. Ann. §70-2-34. Under New Mexico law, the same provisions which relate to natural gas apply to CO₂, insofar as they are applicable. Id.

(14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

(a) a formula which provides that each owner in the unit shall share in the production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geological and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

* * *

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

Amoco Prod. Co., No. R-6446-B, unpub. order at 3-4 (N.M. Oil. Conservation Comm'n Jan. 23, 1981).

The Heimanns appealed the OCC's order on rehearing to the New Mexico state district court for Taos County. They argued that there was not substantial evidence supporting the OCC's determination that the proposed unitization would protect their correlative rights. The district court, however, affirmed the Commission. Casados v. Oil Conservation Comm'n, No. 81-176, unpub. order at 4 (N.M. 8th Dist. Apr. 5, 1982). The Heimanns appealed the district court's order to the New Mexico Supreme Court which affirmed. Casados v. Oil Conservation Comm'n, No. 14,359, unpub. order at 8 (N.M. Nov. 10, 1983). The Supreme Court held that the record contained "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected." Id.

In 1984, Amoco filed suit against the Heimanns in federal district court seeking a declaratory judgment under 28 U.S.C. § 2201(a) that Amoco had properly unitized the interests covered under the leases. The Heimanns counterclaimed alleging three theories of recovery: 1) unfair allocation of royalties under the unitization agreement; 2) undervaluation of the extracted CO₂; and 3) surface damage. At the conclusion of the trial, the court instructed the jury on the components of Amoco's good faith duty which was obliged to follow in exercising its power under the unitization clause:

INSTRUCTION NO. 18

Amoco's duty of good faith is not fulfilled merely by refraining from dishonest conduct. Rather, Amoco has certain affirmative duties which it must fulfill as a prerequisite to a finding of good faith. These are:

- (a) Disclosure to the Heimanns of the material facts affecting their interest in the proposed unitization, including the geological and geophysical characteristics of their lands compared with that of other lands within the proposed unit area,

and the significance of that data as it affects the Heimanns' interest;

(b) Cooperation with the Heimanns in planning the unitization program. Such cooperation may consist of communicating to the extent possible with the Heimanns in an effort to impart pertinent knowledge to the Heimanns; and

(c) Disclosure to the Heimanns of any interests of Amoco in unitization which were adverse to the interest of the Heimanns.

The jury returned a special verdict in favor of Amoco on the fair market value and surface damage claims, but found for the Heimanns on the royalty allocation charge. The jury awarded the Heimanns damages in the amount of \$3,500,000 compensatory damages and \$500,000 punitive damages. The district court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns lands void.

II.

Unitization refers to the consolidation of mineral or leasehold interests in oil or gas covering a common source of supply.³ 1 B. Kramer & P. Martin, The Law of Pooling and Unitization § 1.02 at 1-3 (3d ed. 1989); see Parkin v. Corporation Comm'n of Kansas, 677 P.2d 991, 1002 (Kan. 1984). Unitization resulted from state legislatures' efforts to modify the rule of capture which had previously been applied to oil and gas law. See Clark Oil Prod. Co. v. Hodel, 667 F. Supp. 281, 290 (D.N.D. 1982); Kramer & Martin, supra p. 7, § 3.02. The goals of unitization are conserving resources by preventing waste and protecting landowners' correla-

³ While frequently used interchangeably, the terms "pooling" and "unitization" refer to separate procedures. Pooling involves the combination of several small tracts of land to meet the spacing requirements for a single well. Unitization refers to field-wide or partial field-wide operation of a producing reservoir involving multiple adjoining land tracts. 6 H. Williams & C. Meyers, Oil and Gas Law § 901 at 2 (1989); R. Hemingway, Law of Oil and Gas § 7.13 (1983).

tive rights.⁴ See e.g. N.M. Stat. Ann. § 70-2-11 (1987 Rep. Pamp.). Following unitization of an oil field, the royalty clause of a oil and gas lease generally is modified and the lessor becomes entitled to a royalty based on a pro rata share of the production attributable to its land, regardless of whether production is from that land or another tract included within the unit. Williams & Meyers, *supra* n. 2, § 951 at 694.12. The working interest owners' share is based on a participation formula calculated from geological, physical and economic data. Kramer & Martin, *supra* p. 7, § 17.02[5]. No single method of calculating the participation formula is appropriate for all situations, Williams & Meyers, *supra* n. 2, § 970 at 816.5, and although the most frequently employed basis for allocating unitization production is surface acreage, *id.* § 970.1 at 816.6, arriving at a perfect participation agreement is impossible. Kramer & Martin, *supra* p. 7, § 17.02[5][a] at 17-16. As this court has explained:

The percentage of an estimated pool recovery under a unitized operation assigned to a particular lease represents at best only an estimated contribution from that tract under a single unitization operation. Without more, it cannot be taken as evidence of the estimated recovery therefrom under an independent, individual operation of the lease.

Stanolind Oil & Gas Co. v. Sellers, 174 F.2d 948, 956 (10th Cir.), cert. denied, 338 U.S. 867 (1949).

Two methods exist whereby separately-owned tracts can be combined in a single unit: voluntary unitization by contract or forced unitization by regulatory authority. See Douglass, Powers and Problems of Lessee Pooling, 34 Sw. Legal Fed'n Oil & Gas Inst. 231 (1983). Because the Bravo Dome unit resulted from Amoco's voluntary petition to the OCC, we concern ourselves here with voluntary unitization.

⁴ "Correlative rights" are "rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply." United Petroleum Exploration v. Premier Resources, 511 F. Supp. 127, 129 (W.D. Okla. 1980).

The unitization clause of an oil and gas lease grants the lessee the power to unitize the lessors interest without further consent by the lessor.⁵ Kramer & Martin, supra p. 7, § 8.01 at 8-1; Hemingway, supra n. 2, § 7.13. Without such a clause, the lessee has no authority to pool or unitize the interests of the lessor. Kramer & Martin, supra p. 7, § 8.01 at 8-2. See also Celsius Energy Co. v. Mid Am. Petroleum, 894 F. 2d 1238, 1240 (10th Cir. 1990) (language of lease determines extent of lessee's pooling authority). Because neither the lessor nor the lessee usually knows the relevant facts concerning the need for unitization at the time the lease is signed, unitization clauses must be framed in general terms. Phillips Petroleum Co. v. Peterson, 218 F.2d 926, 933 (10th Cir. 1954), cert. denied, 349 U.S. 947 (1955); Kramer & Martin, supra p. 7, § 8.01 at 8-2; Hemingway, supra n. 2, § 7.13 (unitization clauses in oil and gas leases are to be interpreted liberally). But see Leonard v. Barnes, 404 P. 2d 292, 301 (N.M. 1965) (where an oil and gas lease contains no express provision to unitize, courts will not strain to interpret contract to provide for unitization or pooling).

In addition to contractual limitations on the exercise of the lessee's unitization power, an oil and gas lessee owes the lessor the additional duty of fair dealing, often stated in terms of good faith. Kramer & Martin, supra p. 7, § 8.06 at 8-32; Hemingway, supra n. 2, § 7.13. In Boone v. Kerr-McGee Oil Indus., 217 F.2d 63 (10th Cir. 1954), this court explained that the good faith duty is necessary because of the unilateral power vested in the lessee by a unitization clause:

Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for the exercise of such power. All the authorities are to this effect.

⁵ Such clauses can be said to effectuate voluntary pooling or unitization in that the pooling or unitization is not compelled by state authority. On the other hand, because such clauses inevitably vest the lessee with the unilateral power to pool or unitize, the pooling or unitization implemented under such clauses is not voluntary for the lessor. See Kramer & Martin, supra p. 7, § 8.02 at 8-2.

In approaching a consideration of this question, we keep in mind a further principle and that is that the law presumes that men will act honestly and fairly in dealing with each other. In other words, the law presumes honest and fair dealing, and bad faith or fraud is never presumed and must be established affirmatively.

Id. at 65 (footnote omitted). In Peterson, we further explained the good faith duty of oil and gas lessees in effectuating voluntary unitization agreements:

A lessee is bound by implied covenants in the lease to diligently explore and develop the lease and to do so under a fair unitization plan, if unitization is effected; to market the production if the oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for the interests of both the lessor and the lessee, would do; and, in case of unitization to act fairly and in good faith, with due regard for the lessors' interests, and to provide for a fair apportionment of the oil produced.

218 F.2d at 934 (footnote omitted). Because the unitization plan at issue in Peterson increased efficiency of oil production, we held the lessee's unitization to be in good faith. Id.

A lessee's good faith is often called into question when the pooling or unitization power is exercised close to the end of the primary term, Kramer & Martin, *supra* p. 7, § 8.06[2]; *see, e.g., Amoco Prod. Co. v. Underwood*, 558 S.W. 2d 509, 512-13 (Tex. Civ. App. 1977) (where unit established solely to retain leases that would otherwise expire, lessee acted in bad faith); *but see Boone*, 217 F.2d at 65-66 (mere fact that only a few months remained in lease at time of unitization did not constitute bad faith), when the lessee includes nonproductive land in the unit, Kramer & Martin, *supra* p. 7, § 8.06[2]; *see e.g., Southwest Gas Prod. Co. v. Seale*, 191 So.2d 115, 121 (Miss. 1966), or when the lessee's economic interests are antagonistic to those of the lessor, Kramer & Martin, *supra* p. 7, § 8.06[2]. However, when and how to drill usually remains the prerogative of the driller; a mere exercise of that

power contrary to the desires of the lessors or the weight of geological opinion does not, in itself, show a lack of good faith. Diggs v. Cities Serv. Oil Co., 241 F. 2d 425, 427 & n.2 (10th Cir. 1957). Moreover, although the lessee's duty of good faith requires that it take the lessor's interest into account in exercising its powers under the unitization clause, the lessee need not subordinate its interest entirely to those of the lessor. See Elliott v. Davis, 553 S.W. 2d 223, 226-27 (Tex. Civ. App. 1977). Thus, although the lessee's good faith duty has at times been referred to as fiduciary, such standard is altogether too strict. See Amoco Prod. Co. v. Jacobs, 746 F.2d 1394, 1398-99 (10th Cir. 1984); Vela v. Pennzoil Producing Co., 723 S.W.2d 199, 206 (Tex. App. 1986).

A.

The district court understandably relied upon this court's opinion in Jacobs for the proposition that, in order to satisfy the duty of good faith, a lessee must: 1) disclose geological facts affecting the lessor's interest in the unitization; 2) cooperate with the lessor in planning the unitization; and 3) disclose any interest in the unitization adverse to the lessor. While Jacobs contains language that can be read to support this view, 746 F.2d at 1401, we cannot determine from the text of the opinion whether the court actually intended to create such an expansive definition of good faith.⁶ After consulting Boone, Peterson and other cases and authorities on unitization, however, we conclude for the reasons stated below that Jacobs did not intend to create such an unprecedented rule of good faith.

Although inclusion of geologically inferior land in the Bravo Dome unit by lessee Amoco could violate its duty of good faith,

⁶ We are not alone in our inability to decipher Jacobs's holding; several scholarly works have expressed similar difficulty. See e.g., Kramer & Martin, *supra* p. 7, § 17.01 at 17-3 n.4 (criticizing Jacobs); E. Kuntz, J. Lowe, O. Anderson & E. Smith, Cases and Materials on Oil and Gas Law, 744 (1986) (suggesting students read Jacobs "[for] a case illustrating the difficulty courts have in dealing with this question [of good faith]"). Moreover, it is apparent that the district court shared our confusion over Jacobs when it informed counsel: "[B]eing very frank with you, both you gentlemen on both sides are apparently . . . as confused on what [Jacobs] said as I am." Rec. vol. IV at 350.

no authority imposes a duty upon lessees to produce and disclose geological facts to a lessor comparing the lessor's mineral interests to those in the rest of the unit. Under New Mexico law, an oil or gas lease must be given the legal affect resulting from the language within the four corners of the instrument, absent ambiguity. See Owens v. Superior Oil Co., 730 P.2d 458, 459 (N.M. 1986). Because the Heimanns assented to a lease which unequivocally granted Amoco the power to unitize, subject to approval by governmental authority, we decline to stray beyond the four corners of the lease to impose upon Amoco a duty to cooperate with the lessor in planning its unitization. If Amoco operated the Bravo Dome unit in a manner adverse to the Heimanns' interest, such conduct might constitute bad faith. However, no authority imposes an affirmative duty upon a lessee to disclose every interest in a unitization adverse to the lessor and we decline to create one here.

While we understand how the district court, relying upon the equivocal language in Jacobs, reasonably could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, we conclude that the court's instruction was too broad. Because we hold that the OCC's approval of the Bravo Dome unit renders the good faith inquiry unnecessary in this case, we do not address whether the erroneous instruction prejudiced Amoco.

B.

A good faith duty is imposed where unbridled discretion is vested in an oil or gas lessee by a unitization clause. See Boone, 217 F.2d at 65. If a lessee had completed discretion in unitizing an oil or gas field, the lessee might, in bad faith, combine lessor's land with less productive land, calculate a production formula which underrepresents the lessor's mineral interest, or unitize solely to avoid the termination of a lease. But where a neutral and detached agency approves a proposed unitization after undertaking an extensive and independent study of geological, physical and economic data, the agency normally will constrain such abuses by a lessee. See Celsius Energy, 894 F. 2d at 1240 (good faith requirement imposed to limit lessee's broad authority under pooling clauses.).

A good faith duty also may serve to assure the fair allocation of oil and gas produced by the unit. See Phillips, 218 F.2d at 934.

Where the lessee maintains complete discretion in formulating a unitization plan, the lessee might abuse that discretion and select a participation formula which underrepresents the contribution to the unit from the lessor's land. However, where an agency such as the OCC passes upon the fairness of a proposed participation formula, concerns of lessee unfairness are ameliorated. For unless a proposed unitization plan provides for a fair participation formula, it will not win OCC approval. See N.M. Stat. Ann. §§ 70-2-11, 70-2-33(H); see also N.M. Stat. Ann. § 70-7-6(B) (approval criteria under Statutory Unitization Act).

Evaluating the statutory framework behind the OCC, we are convinced that it ameliorates the danger of lessee unfairness which gave rise to the good faith duty. Where approval of a unitization plan is finally determined by the OCC, the dangers resulting from the lessee's complete discretion which concerned this court in Boone, are absent. See also Celsius Energy, slip op. at 6. And where the OCC approves the participation formula after a careful and independent inquiry into the relevant geophysical and economic criteria, a fair allocation of proceeds is determined without resort to the lessee's good faith duty. Therefore, because the components of a lessee's good faith duty are necessarily encompassed within the OCC's approval criteria, it is a waste of judicial resources to conduct a second good faith inquiry here.⁷

We recognize that our analysis may conflict with language in Jacobs suggesting that the OCC cannot, by its "blessing" of a unitization plan, rule on the question of good faith. 746 F.2d at 1403-04. However, with all due respect, we believe the Court in Jacobs overlooked explicit statutory language empowering the OCC to rule on the fairness of a proposed unitization plan, see N.M. Stat. Ann. §§ 70-2-33(H); cf. N.M. Stat. Ann. § 70-7-6 (B), and ignored the proper deference owed by federal courts to the

⁷ We note that the Amoco-Heimann lease did not require approval by the New Mexico Oil Conservation Commission, but rather, "by any governmental authority." In holding that the OCC's approval of the Bravo Dome unit is conclusive on the issue of good faith, we therefore limit our holding to the OCC and recognize that a different result may prevail under a different statutory scheme. See, e.g., Samson Resources Co. v. Corporation Comm'n, 702 P.2d 19, 23 (Okla. 1985) (private action alleging good faith violation by unit operator was not precluded by Oklahoma Corporation Commission's previous approval of unit because action did not implicate correlative rights, as defined under Oklahoma law).

findings of state administrative agencies, *see* discussion *infra* at 17-20. Given the elaborate procedures required for obtaining OCC approval of a proposed unitization, as well as the technical expertise possessed by its members, it is inaccurate to describe the Commission's approval process as a mere "blessing." *See* N.M. Stat. Ann. §§ 70-2-4 through 70-2-10. Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. To the extent that Jacobs holds to the contrary, it is overruled.⁸

III

Having concluded that a good faith inquiry is unnecessary where the fairness of a unitization plan already has been adjudged by a regulatory agency entitled to full faith and credit by a federal court, we must determine whether the OCC is entitled to such credit.

A.

Where a state agency acts in a judicial capacity, resolves facts properly before it and the parties have had an adequate opportunity to litigate, we accord the agency's decision the same preclusive effect to which it would be entitled in the state's courts. University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986). New Mexico has granted preclusive effect to the findings of administrative agencies acting within their proper capacity. *See* State v. Rio Rancho Estates, Inc., 624 P.2d 502, 504 N.M. (1981); Property Tax Dept. v. Molycorp, Inc., 555 P.2d 903, 905 (N.M. 1976); City of Socorro v. Cook, 173 P. 682, 684-85 (N.M. 1918). However, New Mexico courts have never considered the preclusive effect of an OCC decision. Applying the standard enunciated by the New Mexico courts, we therefore consult general principles of preclusion to

⁸ Because this panel opinion overrules Tenth Circuit precedent, it has been circulated among all active judges of this court. All judges agree with the panel's holding that, because Amoco's good faith was necessarily encompassed with the OCC's consideration of the Bravo Dome unit, the Commission's approval of said unitization is conclusive on the question of Amoco's good faith.

anticipate the effect of the OCC approval of the Bravo Dome unit.

When an agency's function resembles that of a trial court, the agency adjudication is entitled to preclusive effect. 4 K. Davis, Administrative Law Treatise § 21:3 at 51-52 (1983). Conversely, where the agency's action is merely ministerial, res judicata and collateral estoppel do not attach. Id. In determining whether the administrative agency was "acting in a judicial capacity," Elliott, 478 U.S. at 799, no single model of procedural fairness is dictated by the due process clause, Kremer v. Chemical Constr. Co., 456 U.S. 461, 483 (1981). Rather, we must look to our prior cases as well as the Restatement (Second) Judgments § 83⁹ to determine whether the OCC acts in a judicial capacity when it approves a proposed unitization plan.

In Long v. Laramie County Community College Dist., 840 F.2d 743 (10th Cir.), cert. denied, 109 S. Ct. 73 (1988), we held that a state college grievance committee's finding that an employee had been harassed sexually was preclusive in a subsequent action brought under 42 U.S.C. §§ 1983, 1985. Because most of the par-

⁹ The Restatement provides in pertinent part:

§ 83. Adjudicative Determination by Administrative Tribunal.

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication. . . .

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specific parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Restatement (Second) Judgments § 83 at 266-67 (1982). Although this section specifically refers to "res judicata," or claim preclusion, it also applies to collateral estoppel, issue preclusion. Id. comment b at 270-71.

ties before the grievance committee had been represented by counsel, witnesses were cross-examined, documentary evidence was introduced in accordance with Wyoming APA and the committee rendered findings and recommendations which were reviewed by College's Board of Trustees, we concluded that the commission was acting in a judicial capacity under Elliott.¹⁰ Id. at 751. In Katter v. Arkansas La. Gas, 765 F. 2d 730 (8th Cir. 1985), the Eighth Circuit similarly held that an integration order by the Arkansas Oil and Gas Commission was entitled to full faith and credit in a subsequent action brought in federal court:

Clearly the Arkansas legislature intended an adjudicatory, in rem order [by the Oil and Gas Commission] which, when final, would have all the force and effect of a court judgment; and in fact, required and provided for all the things necessary to give it that effect. (citation omitted). In general, then, such an order would fix the parties' rights and duties as fully and finally as a court judgment—albeit here a default judgment—and would be entitled to the same full faith and credit and preclusive effect.

Id. at 734.

B.

The New Mexico Oil Conservation Commission consists of three persons: a designee of the Commissioner of Public Lands, a designee of the Secretary of Energy, Minerals and Natural Resources and the Director of the Oil Conservation Division. N.M. Stat. Ann. § 70-2-4. The two designated members must be "persons who have expertise in the regulation of petroleum production by virtue of education or training," id., while the third member must either be a registered petroleum engineer or else,

¹⁰ Both Elliott and Long considered whether state administrative fact findings are preclusive in a federal cause of action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico courts. See Braselton v. Clearfield State Bank, 606 F. 2d 285, 287 & n. 1 (10th Cir. 1979). We therefore rely upon Elliott and Long only for general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

by virtue of education and experience, have experience in petroleum engineering. N.M. Stat. Ann. §70-2-5(B). The OCC has authority to subpoena witnesses, compel testimony and require production of books, papers and records relative to matters within the commission's jurisdiction. N.M. Stat. Ann. § 70-2-8. OCC members may administer oaths to any witness in any proceeding; a person who testifies falsely under oath before the commission is guilty of perjury. N.M. Stat. Ann. § 70-2-10 Hearings of the OCC are held in public, N.M. Oil Conservation Div. R. 1201 (1989), after providing interested parties with notice, N.M. Oil Conservation Div. R. 1204-07, and may be initiated upon the motion of any operator, producer or person having a pertinent property interest. N.M. Oil Conservation Div. R. 1203. All pleadings before the OCC must be mailed to adverse parties, N.M. Oil Conservation Div. R. 1208, and all testimony delivered before the Commission must be formally recorded, N.M. Oil Conservation Div. R. 1210. Any person testifying under subpoena or in support of or in opposition to a motion before the Commission must do so under oath. Id. The OCC's procedural rules further provide:

Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by doing so, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

N.M. Oil Conservation Div. R. 1212. In reaching a decision, the OCC must make written findings of fact that have sufficient support in the record. Fasken v. Oil Conservation Comm'n, 532 P. 2d 588, 590 (N.M. 1975). Any party adversely affected by an order of the Commission may petition for rehearing, N.M. Stat. Ann. § 70-2-25(A); any party dissatisfied with the disposition of the rehearing may appeal to the state district court, N.M. Stat. Ann. § 70-2-25(B), where the OCC's unitization decision is reviewed for substantial evidence, Viking Petroleum v. Oil Conservation

Comm'n, 672 P.2d 280, 282 (N.M. 1983). Although New Mexico courts will accord "[s]pecial weight . . . to the experience, technical competence and specialized knowledge of the Commission[.]" id., the OCC's finding must be based on ultimate facts involving "foundational matters," and "basic conclusions of fact [.]'" Continental Oil v. Oil Conservation Comm'n, 373 P. 2d 809, 814-15 (N.M. 1962).¹¹

Applying Long and the criteria enunciated in Restatement (Second) Judgments § 83, we are satisfied that the OCC's approval process is entitled to preclusive effect. As parties interested in the OCC's proceedings, the Heimanns received notice of the proposed adjudication, see id. § 83(2)(a), and, at least during the rehearing, were represented by counsel, see Long, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimann's enjoyed the opportunity to cross-examine Amoco's witnesses and present evidence and legal argument of their own. See id.; Restatement (Second) Judgments § 83(2)(b). The OCC's order approving the Bravo Dome unit formulated the issues of law and fact in terms of their specific application to the Heimanns correlative rights, see id. § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, see id. § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo Dome unit; its decision is therefore entitled to preclusive effect. See City of Socorro, 173 P. at 684-85.

¹¹ Continental Oil contains language which, when viewed in isolation, suggests that the OCC is not acting in a judicial capacity for preclusion purposes when it approves a proposed unitization plan. 373 P. 2d at 818. However, closer analysis of the holding belies such an interpretation. Continental Oil held: 1) that the OCC is statutorily required to engage in administrative factfinding on the question of waste and correlative rights; 2) that OCC decisions must be based on those "foundational" matters; and, 3) that separation of powers precludes courts from intruding upon the OCC's factfinding prerogatives. Whether the procedures followed by the OCC afford a sufficient degree of due process to be accorded preclusive effect in subsequent proceedings was a question that Continental Oil did not address. Accordingly, notwithstanding the semantic affinity of Continental Oil to the instant inquiry, the Heimanns' reliance of Continental Oil for the proposition that OCC determinations are not entitled to preclusive effect is misplaced. Cf. Rio Rancho Estates, 624 P.2d at 504 (findings of New Mexico State Engineer have preclusive effect in subsequent proceedings).

IV.

Having concluded that the OCC's approval of the Bravo Dome unit is entitled to full faith and credit, we must now determine whether the Heimanns are collaterally estopped from challenging the fairness of the participation formula adopted as part of the unitization plan. Federal courts must apply the law of the state rendering the judgment to determine its collateral estoppel effect; we may not accord greater preclusive effect to a state court judgment than would the state in which the judgment is rendered. Federal Ins. Co. v. Gates Learjet Corp., 823 F. 2d 383, 385 (10th Cir. 1987); see C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction § 4472 (1981).

A.

This court previously has recognized that decisions by state oil conservation agencies may be entitled to collateral estoppel effect. In Chenoweth v. Pan Am. Petroleum, 314 F. 2d 63, 65 (10th Cir. 1963), a lessor of unitized mineral interests sought cancellation of an oil and gas lease. Because the participation formula had been decided upon previously by the Oklahoma Corporation Commission, we concluded that the lessor's actions constituted an improper collateral attack upon the Commission's authority.

The Oklahoma Corporation Commission has unitized the Oil Creek in this area and [plaintiffs] participate in this production under the established formula. Appellant . . . objects to this unitization order and has an appeal pending on this matter in the Supreme Court of Oklahoma. He attempts to litigate the validity of this order on this appeal, but this cannot be done under these circumstances. To do so would clearly be a collateral attack on the order of the Commission.

Id. Other circuits have also recognized that unitization orders by state oil conservation agencies must remain inviolate to collateral attack. See e.g., Katter, 765 F. 2d at 734 (Arkansas law); Trahan v. Superior Oil, 700 F. 2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); Mize v. Exxon, 640 F. 2d 637, 640 (5th Cir. 1981) (Alabama law). But where a subsequent action does not directly

or indirectly challenge a previous order by a state oil conservation commission, collateral estoppel and res judicata do not attach. See e.g., Greyhound Leasing & Financial Corp. v. Joiner City Unit, 444 F. 2d 439, 445 (10th Cir. 1971) (lessor's action against unit operator for damages caused by secondary recovery methods did not constitute collateral attack to any order of the Oklahoma Corporation Commission); Richardson v. Phillips Petroleum, 791 F. 2d 641, 646 (8th Cir. 1986) (because denial of money damages was not necessarily encompassed in Arkansas Oil and Gas Commission's denial of injunctive relief halting secondary recovery operations, Commission's decision did not bar subsequent action for money damages).

B.

New Mexico traditionally requires four elements for the invocation of collateral estoppel: 1) the parties are the same or are privies of the original parties; 2) the cause of action is different; 3) the issue of fact was actually litigated; and 4) the issue was necessarily determined. International Paper Co. v Farrar, 700 P.2d 642, 644-45 (N.M. 1985). We address these criteria in turn.

Same Parties: The Heimanns were included among the designated parties who sought and obtained rehearing of the OCC's approval of the Bravo Dome unit. They also were among the persons seeking reversal of the OCC's order in the state district court and the New Mexico Supreme Court.

Different Cause of Action: The administrative proceedings before the OCC and judicial proceedings before the New Mexico courts concerning the approval of the Bravo Dome unit constituted a separate and distinct cause of action from the present action in federal court alleging bad faith on behalf of Amoco.

Issue Actually Litigated: New Mexico employs two criteria for determining whether a proposed unitization may be approved by the OCC: 1) prevention of waste and, 2) protection of correlative rights. N.M. Stat. Ann. § 70-2-11, New Mexico defines correlative rights as follows:

"correlative rights" means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a pool

to produce without waste his just and equitable share of the oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and, for such purposes, to use his just and equitable share of the reservoir energy.

N.M. Stat. Ann. § 70-2-33(H) (emphasis supplied). Taking the plain meaning of the relevant statute, inherent among the OCC's criteria for approving a unitization plan is the fairness of the participation formula. See id.; accord N.M. Stat. Ann. § 70-7-6 (B). In this case, the Heimanns argue that the per-acre allocation of the CO₂ revenues under the participation agreement did not fairly represent the quantity of recoverable CO₂ under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such rights, we must conclude that the fairness of the Bravo Dome unit participation plan was "actually litigated" before the OCC. See Chenoweth, 314 F. 2d at 65; Katter, 765 F. 2d at 734.

Issue Necessarily Determined: Although New Mexico accords preclusive effect to the adjudications of administrative agencies in subsequent judicial proceedings, in order to have such effect, the administrative finding must have addressed questions which were essential to the agency's decision. See Rio Rancho Estates, 624 P.2d at 504. As stated above, in order to approve a unitization plan, the OCC must find that the participation formula protects the correlative rights of all pertinent parties. See N.M. Stat. Ann. § 70-2-11. And in order to determine that the Bravo Dome unitization protected the Heimanns' correlative rights, it was essential that the

OCC rule upon the fairness of the unit's participation formula.¹²

"[C]ollateral estoppel not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." Allen v. McCurry, 449 U.S. 90, 95-96 (1980). Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review, undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns' correlative rights would be accorded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

The district court shall vacate the judgment in favor of the Heimanns and enter judgment in favor of Amoco consistent with this opinion.¹³

REVERSED AND REMANDED.

¹² The Heimanns cite this court's recent opinion of Leck v. Continental Oil Co., 892 F.2d 68 (10th Cir. 1989), for the proposition that collateral estoppel should not attach to the findings of the OCC. In Leck, we certified to the Oklahoma Supreme Court several questions concerning the jurisdiction of the Oklahoma Corporation Commission vis a vis the state courts. Id. at 68. Applying Oklahoma law, the Supreme Court held that the district court, not the Corporation Commission, had jurisdiction over a lessor's claim against the unit operator for a breach of contract and violation of the operator's fiduciary duty to protect lessor's correlative rights. Leck v. Continental Oil Co., ___ P.2d ___, No. 72,054, slip op. at 8, 10 (Okla. Nov. 28, 1989). The Oklahoma court limited its holding to the jurisdictional question and explicitly declined to address the res judicata or collateral estoppel effect of the prior adjudication before the Commission. Id. at 8. Accordingly, to the extent that the Heimanns rely upon Leck to argue that collateral estoppel should not attach to the findings of the OCC, their reliance is misplaced.

¹³ Because we reverse the judgment of the district court, we need not consider the additional issues raised by Amoco on appeal or address the Heimanns' cross-appeal.

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE OF
CONSIDERING:

CASE NO. 6967
Order No. R-6446

APPLICATION OF AMOCO PRODUCTION
COMPANY FOR APPROVAL OF THE BRAVO
DOME CARBON DIOXIDE GAS UNIT
AGREEMENT, UNION, HARDING, AND
QUAY COUNTIES, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on July 21, 1980, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 14th day of August, 1980, the Commission, a quorum being present, having considered the testimony, the record, and the exhibits, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof with respect to prevention of waste and protection of correlative rights.

(2) That the applicant, Amoco Production Company, seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement covering 1,174,225.43 acres, more or less, of State, Federal and Fee lands described in Exhibit A attached hereto and incorporated herein by reference.

(3) That all plans of development and operation and all expansions or contractions of the unit area should be submitted to the Director of the Oil Conservation Division, hereinafter referred to as the Division, for approval.

(4) That approval of the proposed unit agreement should promote the prevention of waste and the protection of correlative rights within the unit area.

IT IS THEREFORE ORDERED:

(1) That the Bravo Dome Carbon Dioxide Gas Unit Agreement is hereby approved.

(2) That the plan contained in said unit agreement for the development and operation of the unit area is hereby approved in principle as a proper conservation measure; provided, however, that notwithstanding any of the provisions contained in said unit agreement, this approval shall not be considered as waiving or relinquishing, in any manner, any right, duty, or obligation which is now, or may hereafter be, vested in the Division to supervise and control operations for the exploration and development of any lands committed to the unit and production of carbon dioxide gas therefrom.

(3) That the unit operator shall file with the Division an executed original or executed counterpart of the unit agreement within 30 days after the effective date thereof; that in the event of subsequent joinder by any party or expansion or contraction of the unit area, the unit operator shall file with the Division within 30 days thereafter counterparts of the unit agreement reflecting the subscription of those interests having joined or ratified.

(4) That all plans of development and operation and all expansions or contractions of the unit area shall be submitted to the Director of the Oil Conservation Division for approval.

(5) That this order shall become effective 60 days after the approval of said unit agreement by the Commissioner of Public Lands for the State of New Mexico and the Director of the United States Geological Survey; that this order shall terminate ipso facto upon the termination of said unit agreement; and that the last unit operator shall notify the Division immediately in writing of such termination.

(6) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ALEX J. ARMIJO, Member

s/Emery C. Arnold
EMERY C. ARNOLD, Member

s/Joe D. Ramey
JOE D. RAMEY, Member & Secretary

SEAL

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE OF
CONSIDERING:

CASE NO. 6967
Order No. R-6446

APPLICATION OF AMOCO PRODUCTION
COMPANY FOR APPROVAL OF THE BRAVO
DOME CARBON DIOXIDE GAS UNIT
AGREEMENT, UNION, HARDING, AND
QUAY COUNTIES, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for rehearing at 9:00 a.m. on October 9, 1980 at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 23rd day of January, 1981, the Commission, a quorum being present, having considered the testimony, the record, and the exhibits, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof with respect to prevention of waste and protection of correlative rights.

(2) That the applicant, Amoco Production Company, seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement (Unit) covering 1,174,225.43 acres, more or less, of State, Federal and Fee lands described in Exhibit A attached hereto and incorporated herein by reference.

(3) That this matter originally came on for hearing before the Commission on July 21, 1980.

(4) That on August 14, 1980, the Commission entered its Order No. R-6446 approving said Bravo Dome Carbon Dioxide Unit Agreement.

(5) That the Commission received a timely application for rehearing of Case No. 6967 from Abe Casados, et al (petitioners).

(6) That petitioners alleged, among other things, that the application was premature, that the Commission's findings and conclusions were based on insufficient evidence, and that additional findings concerning prevention of waste and protection of correlative rights should be made by the Commission.

(7) That on October 9, 1980, a rehearing was held in Case No. 6967 for the purpose of permitting all interested parties to appear and present evidence relating to this matter, including the following particulars:

- (a) prevention of waste within the unit area,
- (b) protection of correlative rights within the unit area as afforded by the unit agreement, its plan and participation formula, and
- (c) whether the unit agreement and its plan are premature.

(8) That the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease by lease basis:

- (a) more efficient, orderly and economic exploration of the unit area; and
- (b) more economical production, field gathering, and treatment of carbon dioxide gas within the unit area

(9) That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

(10) That the unit area is a large area with carbon dioxide gas potential.

(11) That at the time of the hearing and the rehearing some areas

within the unit boundary had experienced a long history of production.

(12) That at the time of the hearing and the rehearing a number of exploratory wells had been completed in scattered parts of the unit.

(13) That the developed acreage within the proposed unit is very small when compared to the total unit area and when viewed as a whole, the unit must be considered to be an exploratory unit.

(14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

- (a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and
- (b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing and income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

(18) That the evidence presented at the rehearing demonstrated a clear need for the carbon dioxide gas projected to be available from the unit for purposes of injection for the enhanced recovery of crude oil from depleted reservoirs.

(19) That approval of the unit and development of the unit area at this time will not result in the premature availability or excess capacity of carbon dioxide gas for injection for enhanced recovery purposes.

(20) That the Commissioner of Public Lands and the United States Geological Survey have approved the proposed unit with respect to state and federal lands committed to the unit.

(21) That the application is not premature.

(22) That this is the largest unit ever proposed in the State of New Mexico, and perhaps the United States.

(23) That there is no other carbon dioxide gas unit in the State.

(24) That the Commission has no experience with the long term operation of either a unit of this size or of a unit for the development and production of carbon dioxide gas.

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

(26) That the current availability of reservoir data in this large exploratory unit does not now permit the presentation of evidence or the finding that the unit agreement provides for the long term development of the unit area in a method which will prevent waste and which is fair to the owners of interests therein.

(27) That further development within the unit area should provide the data upon which such determinations could, from time to time, be made.

(28) That the Commission is empowered and has the duty with respect to unit agreements to do whatever may be reasonably necessary to prevent waste and protect correlative rights.

(29) That the Commission may and should exercise continuing jurisdiction over the unit relative to all matters given it by law and take such actions as may, in the future, be required to prevent waste and protect correlative rights therein.

(30) That those matters or actions contemplated by Finding No. (29) above may include but are not limited to: well spacing, requiring wells to be drilled, requiring elimination of undeveloped or dry acreage from the unit area, and modification of the unit agreement.

(31) That the unit operator should be required to periodically demonstrate to the Commission that its operations within the unit

are resulting in prevention of waste and protection of correlative rights on a continuing basis.

(32) That such a demonstration should take place at a public hearing at least every four years following the effective date of the unit or at such lesser intervals as may be required by the Commission.

(33) That all plans of development and operation and all expansions or contractions of the unit area should be submitted to the Commission for approval.

(34) That in addition to the submittal of plans of development and operation called for under Finding No. (33) above, the operator should file with the Commission tentative four-year plans for unitized operations within the unit.

(35) That said four-year plan of operations should be for informational purposes only, but may be considered by the Commission during its quadrennial review of unit operations.

(36) That the initial four-year plan should be filed with the Commission within 60 days following the entry of this order, and that subsequent plans should be filed every four years within 60 days before the anniversary date of the entry of this order.

(37) That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area.

IT IS THEREFORE ORDERED:

(1) That the Bravo Dome Carbon Dioxide Gas Unit Agreement is hereby approved.

(2) That the plan contained in said unit agreement for the development and operation of the unit area is hereby approved in principle as a proper conservation measure; provided, however, that notwithstanding any of the provisions contained in said unit agreement, this approval shall not be considered as waiving or relinquishing, in any manner, any right, duty, or obligation which is now, or may hereafter be, vested in the Commission to supervise and control operations for the exploration and development of any lands committed to the unit and production of carbon dioxide gas therefrom, including the prevention of waste, and the protection of correlative rights.

(3) That the unit operator shall file with the Commission an executed original or executed counterpart of the unit agreement within 30 days after the effective date thereof; that in the event of subsequent joinder by any party or expansion or contraction of the unit area, the unit operator shall file with the Commission within 30 days thereafter counterparts of the unit agreement reflecting the subscription of those interests having joined or ratified.

(4) That the operator of said unit shall be required to periodically demonstrate to the Commission that its operations within the unit are resulting in the prevention of waste and protection of correlative rights on a continuing basis.

(5) That such demonstration shall take place at a public hearing held at least every four years following the effective date of the unit or at such lesser intervals as the Commission may require.

(6) That all plans of development and operation and all expansions or contractions of the unit area shall be submitted to the Commission for approval.

(7) That in addition to the submittal of plans of development and operation required under Order No. (4) above, the operator shall file with the Commission tentative four-year plans for unitized operations within the Bravo Dome Unit.

(8) That said four-year plan of operations shall be for informational purposes only, but may be considered by the Commission during its quadrennial review of unit operations.

(9) That the initial four-year plan shall be filed with the Commission within 60 days following the entry of this order, and that subsequent such plans shall be filed every four years within 60 days before the anniversary date of the entry of this order.

(10) That this order shall become effective 60 days after the approval of said unit agreement by the Commissioner of Public Lands for the State of New Mexico and the Director of the United States Geological Survey; that this order shall terminate ipso facto upon the termination of said unit agreement; and that the last unit operator shall notify the Commission immediately in writing of such termination.

(11) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ALEX J. ARMIJO, Member

s/Emery C. Arnold
EMERY C. ARNOLD, Member

s/Joe D. Ramey
JOE D. RAMEY, Member & Secretary

SEAL

COUNTY OF TAOS

ROBERT CASADOS, et al.,

Plaintiffs,

-vs-

CONSOLIDATED CAUSE

NO. 81-176

OIL CONSERVATION COMMISSION,

et al.,

MEMORANDUM DECISION

This is an appeal for a review from Orders No. R-6446 and R-6446-B of the Oil Conservation Commission of New Mexico, which approved in its Cause 6967 the proposed Bravo Dome Carbon Dioxide unit over the Tubb geological formation which contains marketable carbon dioxide gas. The plaintiff raises essentially three points for this appeal:

I. Is there substantial evidence to support the findings of the Commission? Plaintiffs challenge in their Petition whether substantial evidence exists on the record of Cause 6967 to support the findings of the Commission contained in the Orders objected to. Without repeating the totality of those findings, they are essentially to the effect that:

A. There is sufficient data to conclude as a geological probability the outer perimeters of the formation within the unitized area containing marketable carbon dioxide deposits;

B. There is insufficient data to conclude as a geological probability the location of the gas within the unitized area in order to determine the best method to protect the correlative rights of the parties and distribution of royalties but there exists sufficient data to determine the two best methods of such distribution.

C. Data can only be collected through exploration and development within the unitized area.

II. Do the findings support the conclusions included by the Commission in the protested Orders?

Appellants also argue that, even though sufficient evidence might exist to support the findings of the Commission, those findings do not support the conclusions of the Commission that:

A. The proposed unit is the best method to provide for orderly development of the gas deposit to prevent waste; and

B. The alternative methods for royalty determination to protect correlative rights set forth in the Orders are the best methods; and

C. The Commission's retaining of jurisdiction would protect the correlative rights of fee owners as development should continue.

III. Did the Commission have authority to approve the unit at its present stage of development?

The appellants were granted leave of the Court at oral argument to raise the issue of the constitutional and statutory authority of the Commission to approve the unit in the manner contemplated in the protested Orders. Specifically, the appellants argue that even though substantial evidence may exist before the Commission to sustain the findings in the Orders, and even though the conclusions should naturally flow from such findings, the Commission has no statutory or constitutional authority to approve what is a preliminary unit at a stage where the Commission concedes in its findings insufficient information exists to determine as a geological probability the actual location of marketable gas within the Tubb formation.

In reference to the above arguments, the Court, having heard the arguments of counsel, having read the transcripts of proceedings before the Commission, having read the briefs submitted by the parties, and otherwise being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. The plaintiffs are all owners of carbon dioxide property rights within the proposed unit area, either in Union, Quay or Harding Counties in New Mexico.

2. The defendant Oil Conservation Commission is a New Mexico regulatory agency empowered under Section 70-2-1 et. seq. to regulate and control production or handling of natural gas, oil,

and, in particular for this case carbon dioxide (Section 70-2-2 and Section 70-2-34 N.M.S.A., 1978 Comp.).

3. The primary mandate of the Commission is to prevent waste in developing natural resources, and in doing so, protecting the correlative rights of owners of land of minerals during exploitation of such natural resources.

4. The defendants Amoco Production Company, Amerada Hess Corporation and Cities Service Company are all foreign corporations licensed to do business in New Mexico and are holders of oil and gas (including carbon dioxide) leases within the area of the proposed unit and/or participants in the proposed unitization, with Amoco being the applicant before the Commission in Cause No. 6967.

5. The intervenor Commissioner of Public Lands and State Land Commissioner is the holder in public trust of fee title to substantial lands within the proposed unit and also is required by law to approve the unitization agreement as it should affect such lands.

6. The Petition to the defendant Commission arose out of agreements contained in oil and gas leases with fee owners of land, some of which are plaintiffs in this case, requiring review and approval of unitization agreements by the Commission. The effort to unitize in this case is therefore characterized as a voluntary unitization where all parties concede that land belonging to fee owners not part of such lease agreements is not included as part of the unit.

7. The transcripts of record before the Commission show that the following evidence was presented at hearing:

A. Adequate geological data to show that the Tubb formation is within the unitized area as a reasonable geological probability.

B. Inadequate geological data exists to show the various underground meanderings of the formation and therefore determine as a geological probability whether certain fee owners are or are not entitled to royalties because of the location of that formation, and in what distribution.

C. The data needed for such determination will occur during the very expiration and production contemplated within the challenged Commission's Orders and at which time much of the waste to protect against would likely occur.

D. The Commission was unable to determine which method of guarantee correlative rights would be best, because the information does not exist on which to reasonably calculate the best method at this time, and therefore alternative methods subject to subsequent review by the Commission were approved.

8. The Commission retained jurisdiction over the unit, to reasonably respond as information develops.

9. The Commission followed in all respects its rules required by Section 70-2-7 N.M.S.A., 1978 Comp.

Based on the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Substantial evidence exists on the record of proceedings before the New Mexico Oil Conservation Commission in Cause No. 6967 to support the findings of fact contained in Orders R-6446 and R-6446-B of that Commission.

2. The conclusions reached in those Orders by the Commission in approving the Bravo Dome unitization agreement are supported by the findings of fact.

3. The Commission acted within its authority in approving the preliminary unitization agreement set forth in its Orders and properly within its mandate to provide an opportunity for property owners to produce insofar as practicable to do so, without waste, a proportion of gas in the formation insofar as can practically be determined and obtained without waste. (See Continental Oil Co. v. Oil Conservation Commission, 70 NM 310, 373 P.2d 809 (1962).

4. The decision of the Oil Conservation Commission should be sustained.

5. The defendants in this case are entitled to their costs.

DONE BY THE COURT this 5th day of April, 1982.

s/Joseph E. Caldwell
DISTRICT JUDGE

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

ROBERT CASADOS, et al., SUPREME COURT OF NEW
MEXICO FILED NOV. 10 1983
Plaintiffs-Appellants, s/Rose Marie Alderete

-vs-

OIL CONSERVATION COMMISSION, et al. No. 14,359
Defendants-Appellees,
ALEX J. ARMIJO, Commissioner of
Public Lands,
Intervenor-Appellee

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Joseph E. Caldwell, District Judge

DECISION

RIORDAN, Justice.

Robert Casados, et al (Appellants), petitioned the district court for review of the New Mexico Oil Conservation Commission (Commission) Orders R-6446 and R-6446-B. The district court upheld the orders of the Commission. On appeal, we affirm the district court.

The issue on appeal is whether the district court properly sustained the Commission's orders approving the Bravo Dome Carbon Dioxide Unit Agreement.

Amoco Production Company (Amoco) is the operator of the Bravo Dome Carbon Dioxide Gas Unit (Unit) which is a voluntary unit for the exploration and development of carbon dioxide gas from approximately 1,035,000 acres of federal, state, and fee lands located in Harding, Quay, and Union Counties, New Mexico. In forming the Unit, Amoco, a unit operator, submitted the Bravo Dome Carbon Dioxide Gas Unit Agreement (Unit Agree-

ment) to the New Mexico Commissioner of Public Lands and the Director of the United States Geological Survey for approval.

The New Mexico Commissioner of Public Lands gave preliminary approval of the Unit Agreement as to form and content, but pursuant to Rule 47 of the State Land Office Rules and Regulations, postponed his final decision pending action by the Commission. Amoco applied to the Commission for approval of the Unit, and after a Commission hearing, Order R-6446 was entered by the Commission approving the Unit. Final approval was then received from the New Mexico Commissioner of Public Lands and by the Director of the United States Geological Survey.

Thereafter, Appellants filed an application for rehearing asking the Commission to set aside Order R-6446, or, in the alternative, to enter additional findings on the questions of the prevention of waste and protection of correlative rights within the Unit area as afforded by the Unit Agreement, and to determine whether the Unit Agreement and its plan are premature.

On January 23, 1981, the Commission entered its Order R-6446-B, which again approved the Unit and which contained extensive findings on waste and correlative rights. The order also imposed certain conditions on unit operators, which, among other things, required periodic public hearings before the Commission, at which time Amoco would be required to show that unit operations will result in the prevention of waste and the protection of correlative rights. Under the order, Amoco is also required to periodically file with the Commission plans of development that may be considered by the Commission in its review of Unit operations.

Petitions to Appeal from Orders R-6446 and R-6446-B were filed in Harding, Quay and Union Counties. The petitions were consolidated and docketed in the district court of Taos County. After hearing, the district court entered judgment affirming the orders of the Commission. The district court found that Appellants are owners of carbon dioxide property rights within the proposed Unit area, that the Commission is a regulatory agency empowered to regulate the control production of handling carbon dioxide, and that the primary mandate of the Commission is to prevent waste in developing natural resources, and in doing so, to protect correlative rights of owners during exploration of those resources. Based upon its findings, the district court concluded that substantial evi-

dence exists to support the Commission's findings, and that the conclusions reached by the Commission in approving the Unit Agreement are supported by the findings of fact. The district court further concluded that the Commission acted within its authority in approving its mandate to provide an opportunity to produce, insofar as practicable, without waste, a portion of gas in the formation, and that the order and decision of the Commission should be sustained.

On appeal, Appellant's claim that the Commission's findings on waste and correlative rights are not supported by substantial evidence. We disagree. In reviewing the district court's order, we make the same review of the Commission's orders as did the district court, and are limited to considering "whether, as a matter of law, the action of the Commission was consistent with and within the scope of its statutory authority, and whether the administrative orders are supported by substantial evidence." Rutter & Wilbanks Corp., v. Oil Conservation Commission, 87 N.M. 286, 287, 532 P.2d 582, 583 (1975) (citations omitted).

In Continental Oil Co. v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962), and in Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975), this Court set forth the standards to be applied when the sufficiency of the findings of an order of the Commission are at issue. In Fasken, 87 N.M. at 294, 532 P.2d at 590, this Court specifically held that the Commission order must contain "[s]ufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings (on waste and correlative rights). In Continental, it was said that although elaborate findings are not necessary, nevertheless '... Administrative findings by an expert administrative commission should be sufficiently extensive to show. . . the basis of the Commission's order.' Id. at 321, 373 P.2d at 816." Thereafter, in Grace, II. v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 532 P.2d 939 (1975), this Court defined the scope of review of an order of the Commission stating that it will review the order to determine if it is substantially supported by the evidence and by applicable law. "'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 208, 532 P.2d 942 (citation omitted).

Finally, in determining whether a finding is supported by substantial evidence, this Court reviews the evidence in the light most favorable to support the findings. See Tapia v. Panhandle Steel Erectors Co., 78 N.M. 86, 89, 428 P.2d 625, 628 (1967).

Waste.

In Continental Oil Co., 70 N.M. at 318, 373 P.2d at 814, (emphasis added) (citation omitted), we held that:

The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and to protect correlative rights. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights.

In defining "waste," NMSA 1978, Section 70-2-3 (emphasis added), provides in pertinent part that:

As used in this act the term 'waste,' in addition to its ordinary meaning, shall include:

A. 'underground waste' as those words are generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas;

B. 'surface waste' as those words are generally understood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of natural gas of any type or in any form or crude petroleum oil, or any product thereof, but including

the loss or destruction, without beneficial use resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells, or incident to or resulting from the use of inefficient storage or from the production of crude petroleum oil or natural gas in excess of the reasonable market demand[.]

This definition of "waste" extends to carbon dioxide gas as well as natural gas. NMSA 1978, Section 70-2-34.

Commission's findings Nos. 8 and 9 of Order R-6446-B reflect the Commission's reasoning in reaching its conclusion that the approval of the Unit will tend to increase the total quantity of carbon dioxide ultimately recovered from the Unit area thereby preventing underground surface waste.

Finding No. 8 provides in part:

That the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease by lease basis:

(a) more efficient, orderly and economic exploration of the unit area;

The record contains substantial evidence to support this finding. Witnesses for Amoco, Cities Services Company, and Appellants testified that unitized operation and management was the best method to be used to develop this field. Furthermore, the evidence shows that unit management will provide for orderly development of the Unit area, and will permit the operator of the Unit to develop the area by drilling wells at the most desirable location, thereby enabling the operator to drain the reservoir in an effective manner with the most efficient spacing pattern. The evidence also substantiates that unit management will avoid wasteful drilling and completion practices since the operator will drill only those wells necessary to produce the reserves. Finding No. 8 further provides that another advantage of unitized operation and management is that it will result in: "more economical production, field gather-

ing, and treatment of carbon dioxide gas within the unit area.”

In view of the evidence, finding No. 9 provides:

That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

A review of the record indicates that Order R-6446-B contains extensive and proper findings sufficient to show the Commission’s reasoning that unitization operation and management of the Unit area would prevent waste. The Commission’s findings reflect the Commission’s reasoning that unitized management and operation of the Unit area was a more efficient method and that it would result in economic savings which would extend the economic lives of the wells involved. This, the Commission found, will lead to the production of carbon dioxide gas that otherwise would not be produced. This prevents waste. Therefore, we determine that the Commission’s findings are supported by substantial evidence.

Correlative Rights.

“Correlative rights” are defined in NMSA 1978, Section 70-2-33(H) (Cum. Supp. 1983), as:

[T]he opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practicably determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy [.]

In Continental, this Court initially stated that “the protection of correlative rights must depend upon the [C]ommission’s findings as to the extent and limitations of the right.” Id. at 324, 373 P.2d at 818. The strict test announced in Continental concerning correlative rights findings was again reviewed by this Court in Rutter, which involved an attack on an Oil Conservation Commission

order approving oversized proration units for failing to contain all findings on correlative rights required by the Continental decision. In announcing our decision in Rutter, we stated:

When the Commission exercises its duty to allow each interest owner in a pool 'his just and equitable share' of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights . . . is subject to the qualification as far 'as it is practicable to do so.' While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet unobtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not constitute 'substantial evidence' or that the orders were improperly entered or that they did not protect the correlative rights of the parties 'so far as [could] be practicably determined . . .'

Id. at 292, 532 P.2d at 588 (citations omitted) (emphasis added).

In the present case, there is substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected. The only limitations on the evidence presented arises from the very nature of exploratory units in that certain evidence is not obtainable until the acreage involved has been more fully developed.

Commission Finding No. 14 provides:

(14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

(a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

This finding is supported by the testimony of expert witnesses.

In its finding No. 15, the Commission concluded that each of the methods of participation described in finding No. 14 "was demonstrated to have certain advantages and limitations." An expert witness for Amoco testified that when it was learned where productive acreage within the Unit was located, the Unit Agreement had a built-in provision to correct these inequities, and that there could be problems with the participating area approach, if there are obligations outside of the area that destroy the concept of orderly and efficient development. Another expert witness testified that the participating area approach was better than a straight acreage approach although it may not be as precise a tool to protect correlative rights as one based on recoverable reserves.

Commission findings Nos. 17, 25, and 37 provide:

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for the development of the unit area in a method that will serve to prevent waste and which is fair to the owners of the interest therein.

(37) That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area.

Order R-6446-B contains the necessary findings which cover correlative rights pursuant to our requirements of Continental and Rutter. Although there is conflicting evidence, we cannot say that the exhibits, statements, and testimony of expert witnesses do not constitute "substantial evidence." On the contrary, the record contains substantial evidence to support the Commission's order.

Voluntary Unitization

There is a distinction between voluntary unitization and forced or compulsory unitization. Voluntary unitization is a contractual agreement among parties for the purpose of primary or secondary production of resources. Forced or compulsory unitization is usually a statutory proceeding to compel nonconsenting interest owners to unitize acreage for purposes of secondary or enhanced recovery. See generally, 6 H. Williams & C. Meyers, Oil and Gas Law, §§ 910 through 948 (1981). New Mexico's Statutory Unitization Act, NMSA 1978, Sections 70-7-1 through 70-7-21 (Unitization Act), is an example of forced or compulsory unitization. However, the Unitization Act does not apply to the situation presented in this appeal. It applies to secondary and tertiary recovery projects, not to voluntary exploratory units for primary production such as that proposed in the Bravo Dome Unit. §70-7-1. The procedures to be followed in compulsory unitization, given its involuntary and adversarial nature, must provide safeguards and protection for nonconsenting interest owners. Thus, because of the adversarial nature of the proceeding, the Commission must determine whether the participation formula for unitization is fair, reasonable, and equitable to both consenting and nonconsenting parties.

The elements of conflict and adversity between the parties are simply not present in voluntary unitization. Because such unitization is affected by negotiation and agreement of the parties, there is no conflict which the court must resolve. The parties themselves have mutually agreed as to how their correlative rights will be protected. In a voluntary unit, only those who have committed to the unit are affected. The very nature of voluntary unitization assures that the correlative rights of the parties are protected. The correlative rights of those not committed to the unit exist independently

of the unit and are otherwise protected by the lease agreements.

The correlative rights of noncommitted owners are not an issue in the present case. A review of the record indicates that the proposed Unit is wholly voluntary. No one can be compelled to join it. The Unit Agreement therefore provides for allocation of produced carbon dioxide on a straight acreage basis, regardless of the actual production on any tract within the Unit.

Conclusion

After reviewing the record, we determine that because of the very nature of the technical subject matter it regulates, the Commission was not premature in the manner in which it deliberated and made its decision to approve the Unit Agreement. It is within the authority of the Commission to consider its orders on the basis of preliminary data where appropriate. The record further indicates that the Unit Agreement will indeed serve to prevent waste and protect the correlative rights of the interest owners in the Unit area. Therefore, the judgment of the district court and the orders of the Commission are affirmed. Each of the parties shall bear their respective costs.

This case is not to be published nor cited as precedent.

IT IS SO ORDERED.

s/William Riordan

WILLIAM RIORDAN, Justice

WE CONCUR:

s/H. Vern Payne

H. VERN PAYNE, Chief Justice

s/Dan Sosa, Jr.

DAN SOSA, JR., Senior Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMOCO PRODUCTION COMPANY,
Plaintiff and
Counterdefendant,

-vs-

Civil No. 84-1430-JB

J. CASPER HEIMANN, et al.,
Defendants and
Counterclaimants,

COURT'S FINDINGS OF FACT
AND CONCLUSION OF LAW

THE COURT having independently adduced evidence during the trial of this matter on November 30 and December 1, 2, 3, 4, 7, 8, 9, 10, 11 and 14, 1987, and without considering the jury verdict in favor of counterclaimants, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Amoco Production Company, hereinafter referred to as "Amoco," is a foreign corporation authorized to do business in New Mexico; that defendants and counterclaimants are residents of the State of New Mexico; and the matters in controversy exceed the sum of \$10,000.00, exclusive of interest and costs.

2. This is an action for declaratory relief on the part of Amoco and for declaratory and injunctive relief on the part of the counterclaimants based upon three mineral leases.

3. The leases which are the subject of this action are as follows:

(a) Oil and Gas Mineral Lease from Fred P. Heimann, et al., lessors, to Amoco Production Company, lessee, dated May 21, 1971, covering approximately 39,420 mineral acres;

(b) Oil and Gas Mineral Lease from James D. Price and

Joanne Price, lessors, to Amoco Production Company, lessee, dated April 9, 1974, covering approximately 1,011 mineral acres (subsequently assigned to Counterclaimants Johann and Bobby Adee as lessors); and

(c) Oil and Gas Mineral Lease from Gertrude Roberts, lessor, to Amoco Production Company, lessee, dated June 3, 1971, covering approximately 640 mineral acres (subsequently assigned to Counterclaimants Van Robertson and Deana Shugart and their respective spouses, as lessors).

4. Each of the leases contained a unitization clause which provides:

Lessee also shall have the right to unitize, pool or combine all or any part of the above described lands with other lands in the same general area by entering into a cooperative or unit plan of development or operation approved by any governmental authority and, from time to time, with like approval, to modify, change or terminate any such plan or agreement and in such event the terms, conditions and provisions of this lease shall be deemed modified to conform to the terms, conditions and provisions of such approved cooperative or unit plan of development or operation, and particularly, all drilling and development requirements of this lease, express or implied, shall be satisfied by compliance with the drilling and development requirements of such plan or agreement, and this lease shall not terminate or expire during the life of such plan or agreement. In the event that said above described lands or any part thereof, shall hereafter be operated under any such cooperative or unit plan of development or operation whereby the production therefrom is allocated to different portions of the land covered by such plan, then the production allocated to any particular tract of land shall, for the purpose of computing the royalties to be paid hereunder to Lessor, be regarded as having been produced from the particular tract of land to which it is allocated and not to any other tract of land; and the royalty payments to be made hereunder to Lessor shall be based upon production only as so allocated. Lessor shall formally express Lessor's consent to any cooperative or unit plan of development or operation adopted

by Lessee and approved by any governmental agency by executing the same upon request of Lessee.

5. The unitization clause imposed an implied duty to Amoco to act fairly and in good faith, with due regard for the counterclaimants' interests and to provide for a fair apportionment of the carbon dioxide gas produced.

6. Amoco implemented the unitization clause in May 1979 by committing the counterclaimants' leases and mineral lands to a unit plan of development consisting of approximately 1,036,000 acres in Harding, Union and Quay Counties, New Mexico, designated as the "Bravo Dome Unit," under a unit plan of development contained in a document entitled "Unit Agreement-Bravo Dome Carbon Dioxide Gas Unit-Union, Harding, and Quay Counties, New Mexico;" that each of the counterclaimants' original mineral leases expressly provided that the counterclaimants would be paid a one-eighth royalty interest on all carbon dioxide gas actually produced from the leased lands in accordance with the mineral ownership of the lands.

7. One of the reasons Amoco unitized counterclaimants' lands was to ensure that the mineral leases with Amoco did not expire according to their terms.

8. Counterclaimants consistently refused, and continue to refuse, to consent to or ratify Amoco's Unit Agreement.

9. The Unit Agreement which was deemed to modify the mineral leases, committed the counterclaimants mineral interests to a tract participation formula by which the counterclaimants were to participate in royalties from the unit production revenues in proportion to the ratio that the net mineral estate under the surface acres of counterclaimants' land bears to the total 1,036,000 acres in the Bravo Dome Unit.

10. The tract participation formula gave no consideration to material variations in the reservoir characteristics nor to material differences in the volume of carbon dioxide gas in place beneath the counterclaimants' lands as compared with other lands within the unit.

11. At the time of the unitization, Amoco had evaluated the geological data of the unit and had determined that the highest net pay

values occurred in the eastern and southeastern portion of the unit, the location of counterclaimants' lands, and that the net pay values decreased towards the western and northern portions of the unit; that the evaluation of reservoir engineering reflected that the higher values of gas in place were to be found in that portion of the reservoir encompassing counterclaimants' mineral lands.

12. Amoco failed and refused to provide counterclaimants with information which would permit their meaningful participation and permit their input into the Unit Agreement, including the tract participation formula.

13. Amoco failed and refused to explain to counterclaimants the significance of Amoco's geological and engineering information so as to permit counterclaimants to make an informed assessment of the adequacy and fairness of the tract participation formula.

14. Amoco knew, or should have known, that the royalty income to the counterclaimants under the tract participation formula would be substantially unfair and highly disadvantageous to the counterclaimants.

15. Under the tract participation formula, counterclaimants were paid on a 3.6% allocation although the gas in place under counterclaimants' mineral land was 8.1%.

16. From its detailed geological and reservoir engineering studies, Amoco knew that the lands of the counterclaimants had significantly superior reservoir qualities and significantly greater volumes of carbon dioxide gas in place compared with other portions of the unit area.

17. In spite of Amoco's knowledge of the reservoir characteristics, Amoco failed to disclose to counterclaimants the material geological and engineering facts known to it concerning the productive superiority of counterclaimants' lands and the significance and importance of these facts in properly assessing the fairness of the unit tract participation formula.

18. In a similar situation in 1955, Amoco had implemented a royalty participation in the La Blanca Field Unit in Hidalgo County, Texas, on a straight acreage basis; that Amoco subsequently revised the participation to an adjusted acre feet basis when it determined that the straight acreage basis was inequitable to the royalty owners; that in the instant case, although it knew that

the tract participation formula was inequitable to the counterclaimants, Amoco failed to present for counterclaimants' consideration any alternative method of royalty allocation consistent with Amoco's duty to act fairly, in good faith, and with due regard for counterclaimants' interests.

19. Although Amoco was aware that counterclaimants refused to execute the Unit Agreement because of their lack of information and knowledge, Amoco failed and refused to disclose its geological information regarding the reservoir characteristics, despite frequent meetings with the counterclaimants at which counterclaimants expressed their concern over their lack of detailed information regarding the gas in place under their lands.

20. At all times Amoco possessed a superior economic position and relative bargaining strength in its dealings with counterclaimants; that Amoco refused to pay payments properly due to counterclaimants in an attempt to coerce counterclaimants to ratify the Unit Agreement.

21. By its conduct as described above, Amoco materially breached its implied duty to counterclaimants to exercise the unitization authority granted under section seven of counterclaimants' leases and to act in good faith, fairly and with due regard for counterclaimants' interests.

22. The unitization provision in counterclaimants' leases is subject to implied terms that will prevent arbitrary and unreasonable dealings and imposes a rigid standard of good faith on the part of Amoco.

23. To the date of the filing of this action, counterclaimants were without full knowledge of the facts known to Amoco regarding the superior reservoir qualities and estimated volumes of carbon dioxide gas in counterclaimants' mineral lands and of the fact that Amoco expected counterclaimants' lands to produce carbon dioxide gas at a rate higher than the average overall performance of the unit.

24. The fact that Amoco obtained the approval of the New Mexico Oil Conservation Division does not establish that the Unitization Agreement and the tract participation formula was fair to counterclaimants.

25. The fact that the Unit Agreement comprised many individual tracts which were leased by multiple lessors did not

relieve Amoco of its duty to make all geological and geophysical information known to counterclaimants in order to permit them to protect their own interests and to participate in a fair development plan.

26. The attendance of counterclaimants, or their representative, at the Oil Conservation Division hearings on the unitization plan were of little consequence since they were lay people and uninformed regarding the complex geological characteristics of the reservoir.

27. Absent declaratory and injunctive relief, counterclaimants will sustain irreparable harm in the future for which there is no adequate or complete remedy at law.

Conclusions of Law

1. The Court has jurisdiction of the parties to, and the subject matter of, this action.

2. The relationship between Amoco and counterclaimants was analogous to that of principal and agent so that Amoco owed counterclaimants the duty to exercise a high degree of good faith and loyalty for the furtherance and advancement of the interests of counterclaimants.

3. Under the relationship between Amoco and counterclaimants, Amoco is required to insure that counterclaimants possessed full knowledge of all facts involving their mineral interests before Amoco could act adversely to the interests of counterclaimants.

4. Amoco had the duty to implement a plan of allocation by which counterclaimants would receive fair and just compensation for the carbon dioxide gas extracted from their mineral lands.

5. Amoco was bound by implied covenants in the lease to implement a fair unitization plan if unitization was to be effected; that it was under a duty to act fairly and in good faith with due regard for the counterclaimants' interests.

6. Amoco breached its implied duty to act in good faith, fairly and with due regard to the counterclaimants' interests as well as its own.

7. The fact that the Unit Agreement comprised many individual tracts which were leased by multiple lessors did not relieve Amoco of its duty to make all geological and geophysical information

known to counterclaimants in order to permit them to protect their own interests to participate in a fair development plan.

8. The fact that the New Mexico Oil Conservation Division approved the unitization plan was not dispositive of whether the unitization plan was fair to counterclaimants.

9. The unitization of counterclaimants' lands by Amoco was undertaken in bad faith and is accordingly declared to be void and of no legal effect; that judgment be entered for counterclaimants declaring that Amoco's purported unitization of counterclaimants' leases was void and of no force and effect; and that judgment be entered terminating the purported unitization of counterclaimants' leases and enjoining Amoco to pay royalties to counterclaimants in the future for production attributable to the counterclaimants' lands in accordance with the terms of their leases with Amoco.

10. The express and implied obligations of Amoco to counterclaimants under the latter's mineral leases, including the duty to pay royalties pursuant to the provisions of those leases, are neither modified nor affected in any manner by the Unit Agreement.

11. The mineral leases between Amoco and counterclaimants are binding and enforceable according to their original terms.

12. Amoco shall be enjoined to pay royalties to counterclaimants in the future on a timely basis for production attributable to counterclaimants' mineral lands in accordance with the provisions of counterclaimants' mineral leases.

13. Amoco's complaint for declaratory judgment will be denied.

s/Juan G. Burciaga
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AMOCO PRODUCTION COMPANY,)	
)	
Plaintiff-counter-defendant-)	
Appellant,)	
Cross-Appellee,)	
)	
-vs-	)	Nos. 88-2070
	)	88-2072
J. CASPER HEIMANN, OWAISSA	)	88-2055
HEIMANN, his wife; ROBERTA	)	88-2355
NELSON; BOBBY D. ADEE;)	
HOWARD W. ROBERTSON; PAULINE)	
ROBERTSON, his wife; JOHNANN)	
ADEE, as Trustee for SHARON)	
ADEE; DOWLEN ADEE; J. CASPER)	
HEIMANN, as Trustee for RANDALL)	
LYNN HEIMANN; JAY DEE)	
HEIMANN; GENE ALVIN)	
HEIMANN; RUSSELL GARY)	
HEIMANN; PAULINE ROBERTSON,)	
as Trustee for VAN HOWARD)	
ROBERTSON; DEANA SHUGART, a)	
married woman dealing in her sole and)	
separate estate; JOHNANN ADEE, in)	
her capacity as Personal Representative)	
of the Estate of Fred P. Heimann,)	
deceased,)	
)	
Defendants-counter-claimants-)	
Appellees-Cross-Appellants,)	
)	
)	
)	
ROCKY MOUNTAIN OIL AND GAS)	
ASSOCIATION; NEW MEXICO OIL)	
& GAS ASSOCIATION)	
)	
Amici Curiae.)	

ORDER

Filed May 24, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, Circuit Judges, and THEIS, District Judge.*

*Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

On consideration of defendants' petition for rehearing and the response to it, we simultaneously with this order file an amended opinion. In all other respects the petition for rehearing is denied.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By s/Patrick Fisher

Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AMOCO PRODUCTION COMPANY,)

Plaintiff-counter-defendant-)

Appellant,)

Cross-Appellee,)

-vs-)

Nos. 88-2070

88-2072

J. CASPER HEIMANN, OWAISSA)

88-2055

HEIMANN, his wife; ROBERTA)

88-2355

NELSON; BOBBY D. ADEE;)

HOWARD W. ROBERTSON; PAULINE)

ROBERTSON, his wife; JOHNANN)

ADEE, as Trustee for SHARON)

ADEE; DOWLEN ADEE; J. CASPER)

HEIMANN, as Trustee for RANDALL)

LYNN HEIMANN; JAY DEE)

HEIMANN; GENE ALVIN)

HEIMANN; RUSSELL GARY)

HEIMANN; PAULINE ROBERTSON,)

as Trustee for VAN HOWARD)

ROBERTSON; DEANA SHUGART, a)

married woman dealing in her sole and)

separate estate; JOHNANN ADEE, in)

her capacity as Personal Representative)

of the Estate of Fred P. Heimann,)

deceased,)

Defendants-counter-claimants-)

Appellees-Cross-Appellants,)

ROCKY MOUNTAIN OIL AND GAS)

ASSOCIATION; NEW MEXICO OIL)

& GAS ASSOCIATION)

Amici Curiae.)

ORDER

Filed June 12, 1990

Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS*,
District Judge.

*Honorable Frank G. Theis, Senior United States District Judge for the
District of Kansas, sitting by designation.

The court has for consideration in the captioned cases:

1. Appellees' second petition for rehearing;
2. Appellees' motion to stay the mandate, together with appellant's response and appellees' reply; and
3. Appellant's motion to include instructions concerning interest in the mandate, together with appellees' response.

Upon consideration whereof, the court denies appellees' second petition for rehearing.

The court also denies appellees' motion to stay the mandate, and directs the clerk to issue the mandate forthwith.

Finally, the court denies appellant's motion to include instructions concerning interest in the mandate. This denial is without prejudice to the appellant's right to bring the issue of interest before the district court when that court enters judgment in favor of the appellant, Amoco Production Company, pursuant to this court's mandate.

Entered for the Court

s/Robert L. Hoecker
ROBERT L. HOECKER, Clerk



2

No. 90-479

Supreme Court, U.S.

FILED

OCT 9 1990

JOSEPH E. SPANGL, JR.,
CLERK

In The
Supreme Court of the United States

October Term, 1990

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife;
ROBERTA NELSON; BOBBY D. ADEE; and JOHNANN
ADEE, his wife; HOWARD W. ROBERTSON and PAU-
LINE ROBERTSON, his wife; JOHNANN ADEE, as
Trustee for SHARON ADEE and DOWLEN ADEE; J.
CASPER HEIMANN, as Trustee for RANDALL LYNN
HEIMANN, deceased, JAY DEE HEIMANN, GENE
ALVIN HEIMANN and RUSSELL GARY HEIMANN;
PAULINE ROBERTSON, as Trustee for VAN HOWARD
ROBERTSON; DEANA SHUGART, a married woman
dealing in her sole and separate estate; and JOHNANN
ADEE, in her capacity as Personal Representative of the
ESTATE OF FRED P. HEIMANN, deceased,

Petitioners,

v.

AMOCO PRODUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Of Counsel:

DANIEL R. CURRENS
AMOCO PRODUCTION
COMPANY
Post Office Box 3092
Houston, Texas 77253
(713) 556-3246

WILLIAM F. CARR
(Counsel of Record)
MICHAEL B. CAMPBELL
BRADFORD C. BERGE
CAMPBELL & BLACK, P.A.
Post Office Box 2208
Santa Fe, N.M. 87504
(505) 988-4421

Counsel for Respondent



TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	3
REASONS WHY THE WRIT SHOULD BE DENIED ..	11
I. The Petition is untimely	11
II. This diversity case was correctly decided below and does not present any important question of federal law.....	13
A. The Tenth Circuit's award of preclusive effect to the OCC's "fairness" finding, as affirmed by the New Mexico judiciary, was correctly decided under <i>Erie R. Co. v.</i> <i>Tompkins</i> , 304 U.S. 64 (1938), and does not present any important question of federal law	15
B. The decision of the Tenth Circuit does not contravene the Heimanns' Seventh Amend- ment right to jury trial	22
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

<i>Alexander v. Hillman</i> , 296 U.S. 222 (1935)	23
<i>Allen v. McCurry</i> , 449 U.S. 90 (1980).....	16
<i>Amoco Prod. Co.</i> , No. R-6446, unpub. order (N.M. Oil Conservation Comm'n Aug. 14, 1980)	7
<i>Atlas Roofing Co. v. Occupational Safety and Health Review Com.</i> , 430 U.S. 442 (1977).....	24, 27
<i>Block v. Hirsch</i> , 256 U.S. 135 (1921).....	25
<i>Buckhalter v. Pepsi-Cola General Bottlers, Inc.</i> , 820 F.2d 892 (7th Cir. 1987).....	17
<i>Casados v. Oil Conservation Comm'n</i> , No. 81-176, unpub. order (N.M. 8th Dist. Apr. 5, 1982).....	8
<i>Casados v. Oil Conservation Comm'n</i> , No. 14,359, unpub. order (N.M. Nov. 10, 1983).....	8
<i>Chenoweth v. Pan American Petroleum Corp.</i> , 314 F.2d 63 (10th Cir. 1963).....	14
<i>Commodity Futures Trading Com. v. Schor</i> , 478 U.S. 833 (1986).....	23
<i>Continental Oil Co. v. Oil Conservation Com.</i> , 70 N.M. 310, 373 P.2d 809 (1962).....	26
<i>El Paso Natural Gas Co. v. Oil Conservation Com.</i> , 76 N.M. 268, 414 P.2d 496 (1966).....	26
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	<i>passim</i>
<i>FCC v. League of Women Voters</i> , 468 U.S. 1205 (1984)	13

TABLE OF AUTHORITIES – Continued

	Page
<i>Federal Power Com. v. Idaho Power Co.</i> , 344 U.S. 17 (1952)	12
<i>Federal Trade Com. v. Minneapolis-Honeywell Regula- tor Co.</i> , 344 U.S. 206 (1952)	12
<i>Grace v. Oil Conservation Com.</i> , 87 N.M. 205, 531 P.2d 939 (1975)	26
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. ___, 106 L.Ed.2d 26, 109 S.Ct. 2782 (1989)	22-24
<i>Katchen v. Landy</i> , 382 U.S. 323 (1966)	23
<i>Katter v. Arkansas Louisiana Gas Co.</i> , 765 F.2d 730 (8th Cir. 1985)	14
<i>Kremer v. Chemical Constr. Corp.</i> , 456 U.S. 461 (1982)	16
<i>Long v. Laramie County Community College Dist.</i> , 840 F.2d 743 (10th Cir.), cert. denied, 109 S.Ct. 73 (1988)	17, 18
<i>Mack v. South Bay Beer Distributors, Inc.</i> , 798 F.2d 1279 (9th Cir. 1986)	17
<i>Mize v. Exxon Corp.</i> , 640 F.2d 637 (5th Cir. 1981)	14
<i>N.L.R.B. v. Jones and Laughlin Steel Corp.</i> , 301 U.S. 1 (1937)	25
<i>Nantahala Power & Light Co v. Thornburg</i> , 476 U.S. 953 (1986)	20
<i>National Latex Products Co. v. Sun Rubber Co.</i> , 276 F.2d 167 (6th Cir. 1960)	13
<i>New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)</i> , ___ U.S. ___, 105 L.Ed.2d 298, 109 S.Ct. 2506 (1989)	20, 21

TABLE OF AUTHORITIES – Continued

	Page
<i>Prentis v. Atlantic Coast Line Co.</i> , 211 U.S. 210 (1908)	<i>passim</i>
<i>Property Tax Dept. v. Molycorp, Inc.</i> , 89 N.M. 603, 555 P.2d 903 (N.M. 1976)	14
<i>Rutter & Wilbanks Corp. v. Oil Conservation Com.</i> , 87 N.M. 286, 532 P.2d 582 (N.M. 1975).....	22
<i>Socorro v. Cook</i> , 24 N.M. 202, 173 P. 682 (1918)	14
<i>State ex rel. Reynolds v. Rio Rancho Estates, Inc.</i> , 95 N.M. 560, 624 P.2d 502 (1981).....	14
<i>Thomas v. Union Carbide Agricultural Products</i> , 437 U.S. 586 (1985)	24
<i>Trahan v. Superior Oil Co.</i> , 700 F.2d 1004 (5th Cir. 1983).....	14
<i>United Petroleum Exploration Inc. v. Premier Resources, Ltd.</i> , 511 F.Supp. 127, (W.D.Okla. 1980).....	4
<i>United States v. Adams</i> , 383 U.S. 39 (1966)	13
<i>United States v. Utah Constr. & Mining Co.</i> , 384 U.S. 394 (1966).....	25
<i>University of Tennessee v. Elliott</i> , 478 U.S. 788 (1986) ..	15-18
<i>West Coast Truck Lines, Inc. v. American Industries, Inc.</i> , 893 F.2d 229 (9th Cir. 1990).....	17
<i>Yancy v. McDevitt</i> , 802 F.2d 1025 (8th Cir. 1986)	17

TABLE OF AUTHORITIES - Continued

Page

STATUTES

28 U.S.C. 1201.....	13
28 U.S.C. 1332.....	9
28 U.S.C. 1738.....	16, 17
N.M. Stat. Ann § 70-2-33(H).....	6
N.M. Stat. Ann. § 70-2-11.....	5, 6
N.M. Stat. Ann. § 70-2-25(A)(B).....	6
N.M. Stat. Ann. § 70-2-34.....	26

In The
Supreme Court of the United States
October Term, 1990

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife;
ROBERTA NELSON; BOBBY D. ADEE; and JOHNANN
ADEE, his wife; HOWARD W. ROBERTSON and PAU-
LINE ROBERTSON, his wife; JOHNANN ADEE, as
Trustee for SHARON ADEE and DOWLEN ADEE; J.
CASPER HEIMANN, as Trustee for RANDALL LYNN
HEIMANN, deceased, JAY DEE HEIMANN, GENE
ALVIN HEIMANN and RUSSELL GARY HEIMANN;
PAULINE ROBERTSON, as Trustee for VAN HOWARD
ROBERTSON; DEANA SHUGART, a married woman
dealing in her sole and separate estate; and JOHNANN
ADEE, in her capacity as Personal Representative of the
ESTATE OF FRED P. HEIMANN, deceased,

Petitioners,

v.

AMOCO PRODUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Amoco Production Company ("Amoco") submits this brief in opposition to the petition for a writ of certiorari filed by Petitioners ("the Heimanns").¹

The Heimanns seek review of a unanimous decision of the Tenth Circuit Court of Appeals in a diversity proceeding. The Tenth Circuit, on the basis of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and applicable state law, held that the Heimanns were precluded from relitigating in federal court (under the guise of a common-law tort claim) the "fairness" of a resource unitization plan proposed by Amoco, which plan had been approved as "fair" to the Heimanns by both the state Oil Conservation Commission (OCC) and, on appeal, by the state's judiciary. Respondent's Appendix (Resp.App.) B, 30a. The court below held that when the OCC, empowered to rule on the fairness of a unitization plan, employing trial-like procedures and after full participation by the Heimanns, finds that a unitization plan adequately protects the interests of all participants, including the Heimanns, such approval is conclusive on the common-law issue of Amoco's "good faith." Resp.App. 46a. The Tenth Circuit reasoned:

Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review,

¹ Amoco Production Company is a wholly owned subsidiary of Amoco Company. Amoco Company is a wholly-owned subsidiary of Amoco Corporation.

undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns correlative rights would be afforded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

Resp.App. 58a.

Amoco submits the Petition is untimely. Moreover, this case was decided correctly below and does not present an important question of federal law. Further review by this Court is not warranted.

STATEMENT OF THE CASE

The Heimanns are lessors, and Amoco the lessee, under three private carbon dioxide leases in northeastern New Mexico.

Under the leases, the Heimanns retained a royalty equal to $12\frac{1}{2}\%$ of the net proceeds received by Amoco from the sale of carbon dioxide produced from their lands. Each lease also contained a "unitization clause" in which the Heimanns unequivocally granted Amoco the right to consolidate the Heimanns' leasehold with other lands to form a common resource development and production unit, subject only to approval "by any governmental authority." The Heimanns' leases further provided that upon unitization, royalty was to be paid to them based on the allocation formula contained in the unit plan.

"Unitization" is the consolidation for development of mineral interests comprising a common source of supply. It is the result of effort by state legislatures to modify the common-law rule of capture which had previously applied to oil and gas law. The goals of unitization, as administered by the state, are conserving resources by preventing waste while simultaneously protecting land-owners' correlative rights.² Resp.App. 37a.

In the late 1970's, Amoco initiated a program to enhance oil recovery in the United States by piping carbon dioxide from the area in which the Heimanns' property is located and injecting it into oil fields in West Texas. To accomplish that objective, Amoco developed a unit plan to unitize mineral interests in the "Bravo Dome" area of northeastern New Mexico. The Bravo Dome is a geological structure which contains a common source of carbon dioxide supply. The Heimanns' leases are located within the Bravo Dome. Amoco's Bravo Dome unit plan provided for payment of royalty to all participants based on a "surface acreage" allocation formula, that is, royalty was allocated to the Heimanns in proportion to the ratio that Heimanns' acreage bore to all acreage within the unit, regardless of whether actual production was from the Heimanns' tracts or from other tracts within the unit. The "surface acreage" allocation formula contained in the Bravo Dome unit plan is the

² Generally, correlative rights are those rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply. *United Petroleum Exploration Inc. v. Premier Resources, Ltd.*, 511 F.Supp. 127, (W.D.Okla. 1980). Resp.App. 37a, n. 4.

most frequently employed basis for allocating unitized production. Resp.App. 38a.

Pursuant to its obligation in the Heimanns' leases, Amoco submitted the Bravo Dome unit plan for approval by appropriate governmental authorities of the State of New Mexico, including the OCC.³

The OCC is an administrative agency comprised of three persons experienced in the regulation of natural resource development and production. It is charged by statute with broad jurisdictional powers to supervise and regulate the production of carbon dioxide. Thus, the OCC has the authority to approve unit plans and to assure that unitization prevents waste and protects the correlative rights of all unit participants. N.M.Stat.Ann. § 70-2-11; Resp.App. 56a. To determine that a unitization plan protects correlative rights, the OCC must consider and determine the "fairness" of the unit royalty allocation

³ The Heimanns' statement [Pet. 3] that "Amoco filed a request for 'preliminary approval' of its proposed unit agreement with the New Mexico Oil Conservation Commission ("OCC"). (Exhibit 17)" is inaccurate and misleading. The exhibit referenced, Exhibit 17, is a submittal not to the OCC, but rather to the Commissioner of Public Lands of the State of New Mexico. Under applicable procedures for approval of unit plans, an applicant is required first to obtain preliminary approval from the Commissioner of Public Lands before seeking approval from the OCC. The Commissioner of Public Lands granted 'preliminary approval' to the unit plan (Exhibit 19), pending examination and hearing by the OCC under trial-like procedures. Upon review and approval by the OCC, discussed *infra*, the plan was returned to the Commissioner of Public Lands, who then gave final approval (Exhibit 20).

formula.⁴ N.M.Stat. Ann. § 70-2-11; Resp.App. 57a. Proceedings before the OCC are conducted with trial-like procedures.⁵ State law provides that any party adversely affected by an order of the OCC may petition for rehearing. And any party dissatisfied with the disposition or the rehearing may appeal to state court, where the OCC decision is reviewed for substantial evidence. N.M.Stat. Ann. § 70-2-25(A)(B); Resp.App. 51a.

After notice and hearing on July 21, 1980, the OCC found that "approval of [Amoco's] proposed unit agreement should promote the prevention of waste and the protection of correlative rights within the unit area" and,

⁴ Specifically, the OCC's statutory obligation to protect "correlative rights" in connection with approval of a unit plan means that any allocation formula must assure that *each owner of property be afforded the opportunity, so far as is practical to do so, to produce without waste his just and equitable share of resources in proportion that the quantity of recoverable resource under his property bears to the total recoverable resources in the pool.* N.M.Stat. Ann. § 70-2-33(H); Resp.App. 56a (emphasis added).

⁵ The OCC has state statutory authority to subpoena witnesses, compel testimony under oath and require the production of documents relevant to matters within its jurisdiction. The agency's procedural rules require that hearings must be held in public, after providing notice to interested parties. All pleadings before the OCC must be served on opposing counsel and all testimony before the agency must be formally recorded. Such rules also provide that full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross examine witnesses. Written findings of fact must be entered that have sufficient support in the record. Resp.App. 50a, 51a.

consequently, approved the unit plan.⁶ *Amoco Prod. Co.*, No. R-6446, unpub. order at 2 (N.M. Oil Conservation Comm'n Aug. 14, 1980) (Pet.App. B at 2).

Together with other opponents of the Bravo Dome Unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns, through counsel, appeared before the OCC and presented evidence that the "surface acreage" royalty allocation formula did not protect their correlative rights. Resp.App. 33a. They argued that the "surface acreage" allocation of carbon dioxide revenues did not fairly represent the quantity of recoverable carbon dioxide under their property. Resp.App. 56a. They cross-examined Amoco's witnesses and they presented their own evidence and legal argument. The OCC again approved the unit plan, concluding that, given available geological knowledge, the "surface acreage" formula was fair and adequately protected the Heimanns' correlative rights.⁷ *Amoco Prod. Co.*, No. R-6556-B, unpub. order

⁶ The Heimanns wrongly imply [Pet. 3] that they did not receive notice of the OCC's July 21, 1980 hearing. Under applicable rules, they did not, and were not required to receive, a copy of Amoco's initial submittal to the New Mexico Commissioner of Public Lands (Exhibit 17). See, note 3, *supra*. The Heimanns indisputably received notice and participated in the actual trial-like hearings conducted by the OCC.

⁷ The Heimanns repeatedly suggest that the OCC's approval of the Bravo Dome unit plan was "preliminary." Pet. 3, 9, 15. But there is nothing "preliminary" about the OCC's approval order. Pet.App. C. The OCC ordered that Amoco's unit Plan "is hereby approved," based on factual findings that

(Continued on following page)

at 3-4 (N.M. Oil Conservation Comm'n Jan. 23, 1981) (Pet.App. C at 3-4). The OCC's order contained findings of fact and conclusions of law addressed in particular to the Heimanns' correlative rights. Resp.App. 52a, 53a.

Following statutory procedure, the Heimanns and others then appealed the OCC's order to the New Mexico State District Court. They argued that the OCC's determination that the proposed unitization would protect their correlative rights was not supported by substantial evidence. The state district court affirmed the OCC. *Casados v. Oil Conservation Comm'n*, No. 81-176, unpub. order (N.M. 8th Dist. Apr. 5, 1982) (Pet.App. D). The Heimanns then appealed the state district court's order to the New Mexico Supreme Court, which also affirmed the OCC, *Casados v. Oil Conservation Comm'n*, No. 14,359, unpub. order (N.M. Nov. 10, 1983) (Pet.App. E). The New

(Continued from previous page)

the unit plan would result in "more efficient, orderly and economic exploration of the unit; and more economical production, field gathering and treatment of carbon dioxide within the unit area". *Id.* at Order ¶ 1, Finding ¶ 8. The OCC found that such advantages would "reduce average well costs, provide for longer economic well life and result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste." *Id.* at Finding ¶ 9. The OCC expressly found that unitization "was not premature." *Id.* at Finding ¶ 21. The OCC approval order did provide that the OCC retained continuing jurisdiction to supervise ongoing unit operations and Amoco has been required, since approval of the unit, "to periodically demonstrate that its operations are resulting in prevention of waste and protection of correlative rights on a continuing basis." *Id.* at Order ¶ 4-7. These conditions subsequent to unit approval, with which Amoco has complied, do not make the OCC's approval of the unit plan "preliminary."

Mexico Supreme Court held that there is "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit will be protected." Pet.App. E at 7.

Despite approval of the unit by the OCC, and despite affirmance of that decision by two levels of judicial review, the Heimanns continued to assert that their leases were not unitized. In 1984 Amoco invoked the trial court's diversity jurisdiction, under 28 U.S.C. 1332, and sought a declaratory judgment that the Bravo Dome unit plan, having been approved by an appropriate governmental agency, had unitized the Heimanns' acreage. The Heimanns, also invoking diversity jurisdiction, counter-claimed against Amoco alleging three common-law theories of recovery: (1) unfair allocation of royalties by Amoco under the unit agreement, constituting a tortious breach of Amoco's duty of good faith; (2) undervaluation of the extracted carbon dioxide; and (3) surface damage.⁸

The trial court rejected Amoco's argument that the "fairness" finding of the OCC, as affirmed by the state's judiciary, was entitled to preclusive effect in the Heimanns' subsequent tort action for alleged breach of the duty of good faith. Resp.App. 32a. Moreover, the trial court erroneously constructed an "expansive" and "unprecedented" definition of Amoco's duty of good faith (Resp.App. 42a), which it utilized in both its instructions to the jury and its own subsequent declaratory

⁸ The jury returned a verdict for Amoco on the Heimanns' claims of under valuation and surface damage. The Heimanns claim no error on those counts.

judgment. The jury returned a verdict in favor of the Heimanns on their "unfair allocation" claim and the trial court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns' land void.

On appeal, the Tenth Circuit reversed both the jury verdict and the trial court's declaratory judgment. It held that the trial court had misconstrued federal and state law precedent, and erroneously failed to apply state rules of issue preclusion, as required by this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Contrary to the Heimanns' statement that the OCC was acting "legislatively,"⁹ the Tenth Circuit expressly found that the OCC, "was acting in a judicial capacity" when it approved the Bravo Dome unit plan. Resp.App. 53a. The Tenth Circuit held that the OCC's approval of the unit plan was entitled to preclusive effect in the Heimanns' subsequent collateral attack against the "fairness" of the unit royalty allocation formula:

In this case, the Heimanns argue that the per-acreage allocation of the carbon dioxide revenues under the participation agreement did not fairly represent the quantity of recoverable carbon dioxide under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to

⁹ The Heimanns' Statement of the Case provides: " . . . under New Mexico law, [the OCC] decision was one in which it was acting 'legislatively' . . . " Pet. 6.

protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such rights, we must conclude that the fairness of the Bravo Dome unit participation plan was "actually litigated" before the OCC.

Resp.App. 56a. The Tenth Circuit reversed the judgment of the trial court and ordered entry of judgment in favor of Amoco. Resp.App. 58a.

REASONS WHY THE WRIT SHOULD BE DENIED

Aside from the untimeliness of the Petition, further review is not warranted because the case below was correctly decided and does not present any important issue of federal law.

I. The Petition is untimely.

The original opinion of the Tenth Circuit was entered April 6, 1990. Resp.App. A, 1a. On April 20, 1990, the Heimanns filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in which they raised the same issues now presented in their Petition to this Court. On May 24, 1990, the Tenth Circuit amended its opinion (Resp.App. B, 30a), but in all other respects denied the petition for rehearing. Resp.App. C, 59a.

The Tenth Circuit did no more in its amended opinion than restate what it had already decided in its original opinion of April 6, 1990. (*Compare*, Appendix A [original opinion] with Appendix B [amended opinion]).

The amended opinion did not change matters of substance or resolve a genuine ambiguity in the original opinion. *Id.* The Heimanns concede that the Tenth Circuit's amendment to its original opinion is "not in any way material" to their Petition for Writ of Certiorari. Pet. 9.

On June 7, 1990, the Heimanns filed a second Petition for Rehearing directed only to the question of whether the Tenth Circuit's decision should be given prospective versus retroactive effect. That issue could have been, but was not, raised in the Heimanns' first Petition for Rehearing. The Heimanns' second Petition for Rehearing was denied on June 12, 1990. Resp.App. D, 61a.

The Heimanns filed this Petition for Writ of Certiorari on September 10, 1990, ninety (90) days after denial of their second Petition for Rehearing, but one hundred eight (108) days after denial of their first Petition for Rehearing. The Heimanns' Petition for Writ of Certiorari does not raise any issue concerning the prospective or retroactive application of the Tenth Circuit's decision, the basis of their second Petition for Rehearing to that court.

The Heimanns' Petition for Writ of Certiorari is untimely.

This Court has held that the time to petition for certiorari begins to run anew from a revised judgment of the court below *only* if the revision "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered," *Federal Trade Com. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952), but not "if the court did no more by the second judgment than to restate what it had decided by the first one," *Federal*

Power Com. Idaho Power Co., 344 U.S. 17, 20 (1952). Accord, *FCC v. League of Women Voters*, 468 U.S. 1205 (1984).

A timely petition for rehearing ameliorates the impact of the stated rule. *United States v. Adams*, 383 U.S. 39, 41-42 (1966). But neither the applicable statute, 28 U.S.C. 1201, nor the rules of this Court or the court below authorize a second or successive petitions for rehearing, see, e.g. *National Latex Products Co. v. San Rubber Co.*, 276 F.2d 167 (6th Cir. 1960), particularly where, as here, the ground for rehearing urged in the second petition could have been raised in the first petition.

Accordingly, the Heimanns' Petition for Writ of Certiorari is late and should be dismissed.

II. This diversity case was correctly decided below and does not present any important question of federal law.

This is a diversity case in which no federal cause of action was pled or tried. The court below, applying *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), "was convinced" that New Mexico courts would give preclusive effect to the OCC's decision, as affirmed by the New Mexico Supreme Court, that the Bravo Dome unit plan was fair and protected the Heimanns' correlative rights. Resp.App. 58a. Accordingly, the court below held that the Heimanns were precluded from mounting in federal court a collateral attack on the "fairness" of the unit's royalty allocation formula under the guise of a common-law tort action. Resp.App. 55a-58a.

The decision of the court below, disallowing collateral attack in federal court on the validity of unitization

orders of state resource conservation agencies is fully consistent with prior Tenth Circuit precedent, *see, e.g. Chenoweth v. Pan American Petroleum Corp.*, 314 F.2d 63, 65 (10th Cir. 1963), and follows the rule adopted without exception by all other circuits that have addressed the issue. *See, Katter v. Arkansas Louisiana Gas Co.*, 765 F.2d 730, 734 (8th Cir. 1985) (Arkansas law); *Trahan v. Superior Oil Co.*, 700 F.2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); *Mize v. Exxon Corp.*, 640 F.2d 637, 640 (5th Cir. 1981) (Alabama law). Resp.App. 53a, 54a.

The Heimanns concede the OCC had jurisdiction to decide the "fairness" of the unit allocation formula. The Heimanns also concede that the "fairness" of the royalty allocation formula was actually litigated before the OCC and they do not contest that they were provided a full and fair opportunity to litigate that issue before the OCC and the New Mexico state courts. Finally, the Heimanns do not challenge the Tenth Circuit's analysis or conclusion that the OCC's "fairness" finding, as affirmed by the New Mexico judiciary, would have been accorded preclusive effect in state courts in New Mexico.¹⁰

Ignoring the import of *Erie*¹¹, the Heimanns instead struggle to erect a two-pronged "federal" challenge to the decision below. They argue that this case merits review because the Tenth Circuit's decision contravenes first,

¹⁰ *See, State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 95 N.M. 560, 624 P.2d 502 (1981); *Property Tax Dept. v. MolyCorp, Inc.*, 89 N.M. 603, 555 P.2d 903 (N.M. 1976); *Socorro v. Cook*, 24 N.M. 202, 173 P. 682 (1918).

¹¹ The Heimanns' Petition fails to even mention this Court's decision in *Erie R. Co. v. Tompkins*, *supra*.

"the federal common-law of issue preclusion," and second, the Heimanns' Seventh Amendment right to trial by jury. Neither argument is correct and neither merits this Court's attention.

- A. The Tenth Circuit's award of preclusive effect to the OCC's "fairness" finding, as affirmed by the New Mexico judiciary, was correctly decided under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and does not present any important question of federal law.**

The Heimanns contend that the Tenth Circuit "did not recognize" that the issue preclusion question in this case presents a "federal question," to be resolved under "federal common-law rules of preclusion" as announced in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). Pet. 10-11. With such a toe hold in the federal door, the Heimanns then argue that the Tenth Circuit's decision "overlooked" the federal standard for ascertaining when an administrative agency acts in a "judicial capacity" as announced by this Court in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). Pet. 12.

There is no merit to the Heimanns' position. This diversity case, involving no federal issue, presents no opportunity for construction and application of "federal common-law rules of issue preclusion." Even if it did, the court below, applying state law standards indistinguishable from *Prentis*, correctly concluded that the OCC acted in a "judicial capacity" in approving the unit plan.

The Heimanns' attempt to construct and apply "federal common-law rules of preclusion" in this diversity case, involving no federal claims, has no basis in Supreme

Court precedent. In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court confirmed its long-held rule, first enunciated in *Erie*, that 28 U.S.C. 1738 requires federal courts to give preclusive effect to state-court judgments whenever the courts of the state from which the judgment emerged would do so:

Indeed, although the federal courts may look to the common-law or to the policies supporting *res judicata* and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgment emerges would do so.

449 U.S. at 96 (emphasis added) (citation to 28 U.S.C. 1738 omitted). See also, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Nothing said in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), changes that rule. Rather, *Elliott* holds only that a decision of a state agency charged with the administration of state employment discrimination laws will be accorded preclusive effect, even if unreviewed by the judiciary, in an employee's subsequent federal cause of action under 28 U.S.C. 1983 so long as the agency acted in a "judicial capacity" and afforded the parties adequate opportunity to litigate. *Id.* at 799. Thus, *Elliott* involved the preclusive effect of an unreviewed state agency decision on a subsequent federal cause of action. In contrast, this case involves only a state common-law tort action – not a federal law claim for relief.¹² Moreover, in this case,

¹² The cases cited by the Heimanns as evidencing confusion or conflict among the Circuits all involved a federal cause

(Continued on following page)

the decision of the state agency was reviewed and affirmed by the state judiciary on the basis of substantial evidence. Without eviscerating *Erie* and indeed 28 U.S.C. 1738, *Elliott* cannot be read, as the Heimanns read it, to support the proposition that federal courts are free, in common-law diversity cases, to ignore the Full Faith and Credit Clause and instead fashion "federal common-law rules of preclusion."

Even if the issue preclusion component of this case presents a "federal question," this case still does not merit Supreme Court review. The Tenth Circuit's conclusion that the OCC had acted in a "judicial capacity" was based on state common-law principles indistinguishable from the test enunciated by Justice Holmes in *Prentis*.¹³

(Continued from previous page)

of action, usually racial discrimination. See, *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 820 F.2d 892 (7th Cir. 1987) (suit pursuant to Title VII, 42 U.S.C. § 2000(e) and 28 U.S.C. 1983 for racial discrimination); *Yancy v. McDevitt*, 802 F.2d 1025 (8th Cir. 1986) (a claim of racial discrimination under 42 U.S.C. 1981 and 1983 and the 13th Amendment); *West Coast Truck Lines, Inc. v. American Industries, Inc.*, 893 F.2d 229 (9th Cir. 1990) (jurisdiction premised on the existence of a federal question pursuant to 28 U.S.C. 1331); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) (an age discrimination case premised on 29 U.S.C. § 621-634).

¹³ Indeed, the Tenth Circuit, acknowledging that *Erie* rules governed this diversity case, nonetheless examined federal principles to assure consistency:

Both *Elliott* and *Long [v. Laramie County Community College Dist.]*, 840 F.2d 743 (10th Cir.), cert. denied, 109 S.Ct. 73 (1988) considered whether state administrative fact findings are preclusive in a federal cause of

(Continued on following page)

Specifically, the court below employed the standards set forth in *Restatement (Second) Judgments*. Resp.App. 47a, 48a. The *Restatement* dictates that in order for preclusive effect to be afforded the decision of an administrative agency, the administrative proceeding must entail the "essential elements of adjudication," including: notice, fair opportunity to litigate, formulation of the issues of law and fact in terms of the application of specific rules to specific parties with respect to specific transactions and finality. *Restatement (Second) Judgments*, § 83. Resp.App. 47a, n. 9. Thus the *Restatement* common-law standard employed by the Tenth Circuit is virtually identical to the test formulated by Justice Holmes in *Prentis*.¹⁴ The Heimanns' argument to the contrary is nothing more than semantics.

(Continued from previous page)

action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico . . . We therefore rely on *Elliott and Long* only for the general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

Resp.App. 49a, n. 10 (citation omitted).

¹⁴ As Justice Holmes in *Prentis* put it:

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to exist. That is its purpose and end.

And the Tenth Circuit, applying the *Restatement* standard to the facts presented, unanimously concluded that the OCC, in approving the unit plan, satisfied all elements necessary for its decision to be given preclusive effect:

Applying *Long* and the criteria enunciated in *Restatement (Second) Judgments*, § 83, we are satisfied that the OCC's approval process is entitled to preclusive effect. As parties interested in the OCC's proceedings, the Heimanns received notice of the proposed adjudication, *see id.*, § 83(a), and, at least during the rehearing, were represented by counsel, *see Long*, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimanns enjoyed the opportunity to cross-examine Amoco's witnesses and present evidence and legal argument of their own. *See id.*; *Restatement (Second) Judgments*, § 83(2)(b). The OCC's order approving the Bravo Dome unit formulated the issues of law and fact in terms of, their specific application to the Heimanns correlative rights, *see id.* § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, *see id.* § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo Dome Unit; its decision is therefore entitled to preclusive effect.

Resp.App. 52a, 53a.

There can thus be no question, whether examined under the *Restatement* or *Prentis*, that the OCC was acting in a "judicial capacity" when it approved the "fairness" of the unit plan. Nor can there be any serious question that in approving the unit plan, the OCC, consistent with

Prentis, was engaged in the declaration and enforcement of liabilities based on the present facts and under existing law. No further review by this Court is warranted.

Moreover, even if the OCC was somehow acting "legislatively," as the Heimanns suggest, the New Mexico judiciary's independent review of that act is, by itself, entitled to preclusive effect. In *Prentis*, this Court found that a Virginia state court, pursuant to Virginia law, was itself acting in a "legislative capacity" in its *de novo* examination of rate orders of a state agency. This Court held that rate-making – whether performed by an administrative agency or, in Virginia's peculiar case, a court – was clearly a "legislative" function. *Prentis*, 211 U.S. at 226. Accordingly, the Court held an injunction against the state court proceeding was not precluded by the Anti-Injunction Act. The Court deferred issuance of the injunction because "final legislative action" had not yet been taken by the Virginia court. *Id.* at 230.

The Heimanns cite *Prentis* for the proposition that judicial affirmance of a decision of administrative agency acting in a "legislative" capacity is itself a legislative act, thereby preventing application of preclusive effect to the decisions of both the agency and the reviewing court. Pet. at 18. The Heimanns overreach, as this Court confirms in *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*, ___ U.S. ___, 105 L.Ed. 2d 298, 109 S.Ct. 2506 (1989).

In *NOPSI*, a New Orleans utility had secured cost-allocation relief from FERC. However, the City Council rate-making body refused a pass-through of such costs in contravention of *Nantahala Power & Light Co. v. Thornburg*,

476 U.S. 953 (1986). The utility sought judicial review of the Council's order in state court and simultaneously sought federal injunction relief on grounds that *Nantahala* pre-empted the issue. The federal district court abstained from deciding the suit and the Fifth Circuit affirmed. The Supreme Court reversed, holding the abstention doctrine inapplicable to the facts presented. The City Council had relied in part on *Prentis*, arguing that abstention was proper because a state court was then reviewing a "legislative act" of an administrative agency. In rejecting this contention, this Court recognized that the critical distinction in *Prentis* was that the state court there was acting as a "legislative" body, itself empowered to set rates:

There is no contention here that the Louisiana courts' review involves anything other than a judicial act . . . Since the state court review is not an extension of the legislative process, NOPSI's pre-emption claim was ripe for federal review when the Council's order was entered.

109 S.Ct. at 2520.

Hence, *NOPSI* confirms, contrary to the Heimanns' suggestion, that judicial review of legislative action by an administrative agency is not necessarily itself a legislative act. Stated differently, judicial review of the legislative findings of an agency may be just that – judicial review. As *Prentis* states: "[t]he question depends not upon the character of the body, but on the character of the proceedings." 211 U.S. at 226.

When *Prentis* is read in light of *NOPSI*, the Heimanns' collateral estoppel argument surely must fail. *NOPSI* teaches that when a court reviews an agency decision, even a legislative one, courts generally act in a

judicial, not a legislative capacity. Clearly that is the case here. When the New Mexico District and Supreme Court affirmed the OCC order, they had no authority, as the Virginia court in *Prentis* did, to change or modify the OCC's decision upon the consideration of new or different evidence. Rather, the New Mexico courts could only act judicially, as courts, to determine whether the OCC's decision was supported by substantial evidence and conformed to statutory mandate. *See, Rutter & Wilbanks Corp. v. Oil Conservation Com.*, 87 N.M. 286, 582, 583 (N.M. 1975).

Accordingly, the independent judicial review and affirmance of the OCC's "fairness" order by New Mexico courts is entitled to preclusive effect, even if the OCC was acting, as the Heimanns contend, in a "legislative" capacity.

B. The decision of the Tenth Circuit does not contravene the Heimanns' Seventh Amendment right to jury trial.

Citing this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ___, 106 L.Ed. 2d 26, 109 S.Ct. 2782 (1989), the Heimanns contend that the Tenth Circuit has deprived them of their right to trial by jury. They assert it is "beyond peradventure" that their claims involve "only private rights" [Pet. 21] and that "without question" they were entitled to a jury trial on Amoco's alleged breach of its common-law duty of good faith. Pet. 22, n. 5.

The Heimanns' argument misconstrues this Court's holding in *Granfinanciera* and fails to recognize the constitutionality under the Seventh Amendment of non-jury

proceedings in which private rights are decided as part of the greater process of adjudicating public rights.

In *Granfinanciera* the question was whether a party who had *not* submitted a debt claim in bankruptcy court and who had *not* otherwise voluntarily appeared in bankruptcy proceedings, was entitled to a jury trial when sued by the bankruptcy trustee to recover an alleged preferential transfer. The Court held that the Seventh Amendment applied and a jury trial was required.

Granfinanciera does not suggest, however, that a party who voluntarily appears and litigates an issue before a jurisdictionally proper forum without a jury is entitled, upon losing, to relitigate the same issue before a jury in another forum – which are the facts at issue here. If there is an analogous case in the bankruptcy context, it is not *Granfinanciera*, but rather this Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966). In *Katchen*, the Court expressly held that a party who *had* appeared and filed claims in a bankruptcy court was not entitled to a jury trial when countersued by the trustee to void an alleged preference. Under the *Katchen* rationale, the Heimanns, who voluntarily litigated the "fairness" of the unit's royalty allocation formula before the OCC, "subjected themselves to all the consequences that attach to an appearance," including the constitutionality of the first tribunal to decide jurisdictionally proper issues, in summary fashion, without a jury. *Granfinanciera*, 106 L.Ed. 2d at 52, n. 14, quoting *Alexander v. Hillman*, 296 U.S. 222, 241-242 (1935).¹⁵

¹⁵ See also, *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 849 (1986), which holds that a party's voluntary

(Continued on following page)

More fundamental than the Heimanns' effective waiver of any right to a jury trial, however, is the fact that: "[T]he Seventh Amendment was never intended to establish the jury as the exclusive mechanism for fact finding in civil cases." *Atlas Roofing Co. v. Occupational Safety and Health Review Com.*, 430 U.S. 442 (1977). In *Atlas*, this Court held that when public rights are being litigated, the Seventh Amendment does not prohibit the assignment of the fact-finding function to a non-jury panel. This Court stated that:

... when Congress creates new statutory "public rights" it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common-law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.

Id. at 455. Thus, it cannot be said that an administrative agency violates an individual's rights to trial by jury when it makes findings in a public rights adjudication which also determine the individual's "private rights." As this Court stated in *Thomas v. Union Carbide Agricultural Products*, 437 U.S. 586, 589 (1985), summarizing the permissible effect of administrative findings in public

(Continued from previous page)

participation in federal administrative proceedings constitutes a waiver of that party's right to trial of state-law counterclaims by an Article III court.

rights litigation on related private rights: "These proceedings surely determine liabilities of individuals."¹⁶

Examined in the context of such precedent, the fundamental question is not whether the Heimanns' common-law lease claim against Amoco involves "purely private rights," but whether the OCC, when it found that the royalty allocation formula in Amoco's unit plan fairly protected correlative rights, was adjudicating public rights. The answer to that question is yes, and accordingly the OCC's decision, even though it necessarily may have affected private rights, does not violate the Seventh Amendment.¹⁷

¹⁶ See also *Block v. Hirsch*, 256 U.S. 135, 158 (1921), and *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937).

¹⁷ This distinction was recognized by the Court in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), in language particularly compelling in this case:

It would disregard the parties' agreement to conclude . . . that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.

. . .

Any claim, whether within or without the disputes clause, can be couched in breach of contract language. The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics.

Id. at 419.

New Mexico has created a comprehensive regulatory scheme, administered by the OCC, to control the development and production of natural resources, including carbon dioxide, within its borders. N.M. Stat. Ann. § 70-2-34. Within this scheme, New Mexico law establishes that the "right" of any individual to gas production from his lands is "not absolute or unconditional" but is instead assertable "only insofar as it is practicable to do so without waste." *Continental Oil Co. v. Oil Conservation Com.*, 70 N.M. 310, 373 P.2d 809, 818 (1962). New Mexico law also establishes that the OCC, when it acts to prevent waste and protect correlative rights, is in essence adjudicating public rights. *El Paso Natural Gas Co. v. Oil Conservation Com.*, 76 N.M. 268, 414 P.2d 496 (1966).¹⁸ Finally, in *Grac v. Oil Conservation Com.*, 87 N.M. 205, 531 P.2d 939 (1975), the New Mexico Supreme Court confirmed that these public rights in the prevention of waste of the resource predominate over individual private rights:

Prevention of waste is paramount, and private rights, such as prevention of drainage not offset by counterdrainage and correlative rights must stand aside until it is practical to determine the amount of gas underlying each producer's tract or in the pool.

531 P.2d at 946.

¹⁸ The New Mexico Supreme Court noted: "Recognizing the need and right of the state, in the interest of the public welfare to prevent waste of an irreplaceable natural resource, the legislature enacted those laws authorizing the Commission to exercise control over oil and gas wells by limiting the total production in the pool, and making it the duty of the Commission to protect the correlative rights of all producers so far as it can be accomplished without waste to the pool." 414 P.2d at 497, 498.

Under New Mexico law, the OCC – an agency with technical expertise, charged by state statute to prevent waste and protect correlative rights – is indisputably an administrative forum in which “public rights are being litigated.” *Atlas Roofing Co. v. Occupational Safety & Health Review Com.*, 430 U.S. 442, 450 (1977). Under *Atlas Roofing*, and its progeny, the OCC can thus perform its statutory fact-finding functions without contravening the Seventh Amendment. As a result, there is simply no merit to the Heimanns’ Seventh Amendment claim.

CONCLUSION

This case bears none of the hallmarks of a case justifying Supreme Court review and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Of Counsel:

DANIEL R. CURRENS
AMOCO PRODUCTION
COMPANY
Post Office Box 3092
Houston, Texas 77253
(713) 556-3246

WILLIAM F. CARR
(Counsel of Record)
MICHAEL B. CAMPBELL
BRADFORD C. BERGE
CAMPBELL & BLACK, P.A.
P.O. Box 2208
Santa Fe, N.M. 87504
(505) 988-4421

Counsel for Respondent



APPENDIX

A	Opinion of the Court of Appeals, dated April 6, 1990.....	1a
B	Opinion of the Court of Appeals, dated May 24, 1990	30a
C	Order Filing Amended Petition and Otherwise Denying Petitioners' First Petition for Rehearing dated May 24, 1990.....	59a
D	Order Denying Petitioners' Second Petition for Rehearing and Denying Petitioners' Motion For Stay, dated June 12, 1990	61a

APPENDIX A
PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AMOCO PRODUCTION)
COMPANY,)

Plaintiff-Counterdefendant-)
Appellant and Cross-Appellee,)

vs.)

J. CASPER HEIMANN; OWAISSA)
HEIMANN, his wife; ROBERTA)
NELSON; BOBBY D. ADEE;)
HOWARD W. ROBERTSON;)
PAULINE ROBERTSON, his wife;)
JOHNANN ADEE, as Trustee for)
SHARON ADEE and DOWLEN)
ADEE; J. CASPER HEIMANN, as)
Trustee for RANDALL LYNNE)
HEIMANN, JAY DEE HEIMANN,)
GENE ALVIN HEIMANN and)
RUSSELL GARY HEIMANN;)
PAULINE ROBERTSON, as)
Trustee for VAN HOWARD)
ROBERTSON; DEANA SHUGART,)
a married woman dealing in her)
sole and separate estate; and)
JOHNANN ADEE, in her capacity)
as Personal Representative of the)
Estate of Fred P. Heimann,)
deceased,)

Defendants-Counterclaimants-)
Appellees and Cross-Appellants.)

Nos.
88-2070, 88-2072
88-2255, 88-2355

(Filed
April 6, 1990)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CV-84-1430)

William F. Carr (Michael B. Campbell & John H. Bemis, with him on the brief), Campbell & Black, Santa Fe, New Mexico, for Plaintiff-Counterdefendant-Appellant and Cross-Appellee.

Steven L. Tucker (Jerry Wertheim & Arturo L. Jaramillo, with him on the brief), Jones, Snead, Wertheim, Rodriguez & Wentworth, Santa Fe, New Mexico, for Defendants-Counterclaimants-Appellees and Cross-Appellants.

Charles L. Kaiser and Mary A. Viviano, Davis, Graham & Stubbs, Denver, Colorado, filed an amicus curiae brief for the Rocky Mountain Oil and Gas Association.

Paul A. Cooter, Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, filed an amicus curiae brief for the New Mexico Oil and Gas Association.

Before SEYMOUR and BALDOCK, Circuit Judges, and
THEIS, District Judge.*

BALDOCK, Circuit Judge.

* The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

Amoco Production Company (Amoco) appeals from a \$4 million judgment arising out of its unitization of a carbon dioxide field in northeastern New Mexico. Amoco argues, *inter alia*, that the district court 1) misinstructed the jury on an oil or gas lessee's duty of good faith, and 2) improperly failed to accord collateral estoppel effect to the findings of the New Mexico Oil Conservation Commission (OCC). Our jurisdiction over this diversity case arises under 28 U.S.C. § 1291. We hold that 1) a good faith inquiry into an oil and gas lessee's conduct is unnecessary where the unitization previously was approved by an independent state agency which passes on the fairness of the participation formula, such as the OCC, and 2) the OCC's approval of the unitization plan in this case has collateral estoppel effect upon the appellees' challenge to the unit's allocation formula. Accordingly, we reverse.

I.

Defendants-Counterclaimants-Appellees (the Heimanns) are a family of ranchers who have lived in northeastern New Mexico since the early part of this century. The Heimanns own 48,120 acres of ranch land in Union, Quay and Harding Counties, New Mexico. Between 1971 and 1974, the Heimanns executed three carbon dioxide (CO₂) and mineral leases with Amoco. Each of these three leases contained a unitization clause which granted Amoco the right to unitize the Heimanns' mineral interests with other lands in the area, subject to approval "by any governmental authority." The leases granted the Heimanns a one-eighth royalty of the net proceeds received from all oil, gas or CO₂ produced on their lands.

In the late 1970's, Amoco embarked upon a plan to pipe CO₂ from northern New Mexico to its west Texas oil fields in order to enhance recovery there. Amoco therefore sought to unitize the mineral rights to approximately 1,174,225 acres of land in Harding, Union and Quay Counties, including the Heimanns's land.¹ The proposed agreement for the "Bravo Dome" unit allocated royalties on the basis of "surface acreage;" production was allocated according to the total surface areas contained in each tract. Amoco sought approval of the Bravo Dome unit from the OCC. The Commission found that "approval of the proposed unit agreement should promote the preventions of waste and the protection of correlative rights within the unit area" and consequently approved the unit agreement. *Amoco Prod. Co.*, No. R-6446, unpub. order at 1 (N.M. Oil. Conservation Comm'n Aug. 14, 1980).

Together with other opponents of the Bravo Dome unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns and other opponents of the unit appeared before the OCC and presented evidence that the per-acre participation formula did not protect their correlative rights. The OCC found in pertinent part:

(14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the

¹ Amoco held a 74% working interest in the unitized lands.

distribution of production or proceeds therefrom from the unit; these methods are as follows:

- (a) a formula which provides that each owner in the unit shall share in the production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and
- (b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

. . . .

Amoco Prod. Co., No. R-6446-B, unpub. order at 3-4 (N.M. Oil, Conservation Comm'n Jan. 23, 1981).

The Heimanns appealed the OCC's order on rehearing to the New Mexico state district court for Taos County. They argued that there was not substantial evidence supporting the OCC's determination that the proposed unitization would protect their correlative rights. The district court, however, affirmed the Commission. *Casados v. Oil Conservation Comm'n*, No. 81-176, unpub. order at 4 (N.M. 8th Dist. Apr. 5, 1982). The Heimanns appealed the district court's order to the New Mexico Supreme Court which affirmed. *Casados v. Oil Conservation Comm'n*, No. 14,359, unpub. order at 8 (N.M. Nov. 10, 1983). The Supreme Court held that the record contained "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected." *Id.*

In 1984, Amoco filed suit against the Heimanns in federal district court seeking a declaratory judgment under 28 U.S.C. § 2201(a) that Amoco had properly unitized the interests covered under the leases. The Heimanns counterclaimed alleging three theories of recovery: 1) unfair allocation of royalties under the unitization agreement; 2) undervaluation of the extracted CO₂; and 3) surface damage. At the conclusion of the

trial, the court instructed the jury on the components of Amoco's good faith duty which it was obliged to follow in exercising its powers under the unitization clause:

INSTRUCTION NO. 18

Amoco's duty of good faith is not fulfilled merely by refraining from dishonest conduct. Rather, Amoco has certain affirmative duties which it must fulfill as a prerequisite to a finding of good faith. These are:

(a) Disclosure to the Heimanns of the material facts affecting their interest in the proposed unitization, including the geological and geophysical characteristics of their lands compared with that of other lands within the proposed unit area, and the significance of that data as it affects the Heimanns' interest;

(b) Cooperation with the Heimanns in planning the unitization program. Such cooperation may consist of communicating to the extent possible with the Heimanns in an effort to impart pertinent knowledge to the Heimanns; and

(c) Disclosure to the Heimanns of any interests of Amoco in unitization which were adverse to the interest of the Heimanns.

The jury returned a special verdict in favor of Amoco on the fair market value and surface damage claims, but found for the Heimanns on the royalty allocation charge. The jury awarded the Heimanns damages in the amount of \$3,500,000 compensatory damages and \$500,000 punitive damages. The district court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns lands void.

II.

Unitization refers to the consolidation of mineral or leasehold interests in oil or gas covering a common source of supply.² 1 B. Kramer & P. Martin, *The Law of Pooling and Unitization* § 1.02 at 1-3 (3d ed. 1989); see *Parkin v. Corporation Comm'n of Kansas*, 677 P.2d 991, 1002 (Kan. 1984). Unitization resulted from state legislatures' efforts to modify the rule of capture which had previously been applied to oil and gas law. See *Clark Oil Prod. Co. v. Hodel*, 667 F. Supp. 281, 290 (D.N.D. 1982); Kramer & Martin, *supra* p. 7, § 3.02. The goals of unitization are conserving resources by preventing waste and protecting landowners' correlative rights.³ See, e.g., N.M. Stat. Ann. § 70-2-11 (1987 Rep. Pamp.). Following unitization of an oil field, the royalty clause of a oil and gas lease generally is modified and the lessor becomes entitled to a royalty based on a pro rata share of the production attributable to its land, regardless of whether production is from that land or another tract included within the unit. Williams & Meyers, *supra* n. 2, § 951 at 694.12. The working interest

² While frequently used interchangeably, the terms "pooling" and "unitization" refer to separate procedures. Pooling involves the combination of several small tracts of land to meet the spacing requirements for a single well. Unitization refers to field-wide or partial field-wide operation of a producing reservoir involving multiple adjoining land tracts. 6 H. Williams & C. Meyers, *Oil and Gas Law* § 901 at 2 (1989); R. Hemingway, *Law of Oil and Gas* § 7.13 (1983).

³ "Correlative rights" are "rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply." *United Petroleum Exploration v. Premier Resources*, 511 F. Supp. 127, 129 (W.D. Okla. 1980).

owners' share is based on a participation formula calculated from geological, physical and economic data. Kramer & Martin, *supra* p. 7, § 17.02[5]. No single method of calculating the participation formula is appropriate for all situations, Williams & Meyers, *supra* n. 2, § 970 at 816.5, and although the most frequently employed basis for allocating unitized production is surface acreage, *id.* § 970.1 at 816.6, arriving at a perfect participation agreement is impossible. Kramer & Martin, *supra* p. 7, § 17.02[5][a] at 17-16. As this court has explained:

The percentage of an estimated pool recovery under a unitized operation assigned to a particular lease represents at best only an estimated contribution from that tract under a single unitized operation. Without more, it cannot be taken as evidence of the estimated recovery therefrom under an independent, individual operation of the lease.

Stanolind Oil & Gas Co. v. Sellers, 174 F.2d 948, 956 (10th Cir.), *cert. denied*, 338 U.S. 867 (1949).

Two methods exist whereby separately-owned tracts can be combined in a single unit: voluntary unitization by contract or forced unitization by regulatory authority. See Douglass, *Powers and Problems of Lessee Pooling*, 34 Sw. legal Fed'n Oil & Gas Inst. 231 (1983). Because the Bravo Dome unit resulted from Amoco's voluntary petition to the OCC, we concern ourselves here with voluntary unitization.

The unitization clause of an oil and gas lease grants the lessee the power to unitize the lessors interest without further consent by the lessor.⁴ Kramer & Martin, *supra*

⁴ Such clauses can be said to effectuate voluntary pooling or unitization in that the pooling or unitization is not

(Continued on following page)

p. 7, § 8.01 at 8-1; Hemingway, *supra* n. 2, § 7.13. Without such a clause, the lessee has no authority to pool or unitize the interests of the lessor. Kramer & Martin, *supra* p. 7, § 8.01 at 8-2. See also *Celsius Energy Co. v. Mid Am. Petroleum*, 894 F.2d 1238, 1240 (10th Cir. 1990) (language of lease determines extent of lessee's pooling authority). Because neither the lessor nor the lessee usually know the relevant facts concerning the need for unitization at the time the lease is signed, unitization clauses must be framed in general terms. *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 933 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955); Kramer & Martin, *supra* p. 7, § 8.01 at 8-2; Hemingway, *supra* n. 2, § 7.13 (unitization clauses in oil and gas leases are to be interpreted liberally). But see *Leonard v. Barnes*, 404 P.2d 292, 301 (N.M. 1965) (where an oil and gas lease contains no express provision to unitize, courts will not strain to interpret contract to provide for unitization or pooling).

In addition to contractual limitations on the exercise of the lessee's unitization power, an oil and gas lessee owes the lessor the additional duty of fair dealing, often stated in terms of good faith. Kramer & Martin, *supra* p. 7, § 8.06 at 8-32; Hemingway, *supra* n. 2, § 7.13. In *Boone v. Kerr-McGee Oil Indus.*, 217 F.2d 63 (10th Cir. 1954), this court explained that the good faith duty is necessary

(Continued from previous page)

compelled by state authority. On the other hand, because such clauses inevitably vest the lessee with the unilateral power to pool or unitize, the pooling or unitization implemented under such clauses is not voluntary for the lessor. See Kramer & Martin, *supra* p. 7, § 8.02 at 8-2.

because of the unilateral power vested in the lessee by a unitization clause:

Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for the exercise of such power. All the authorities are to this effect.

In approaching a consideration of this question, we keep in mind a further principle and that is that the law presumes that men will act honestly and fairly in dealing with each other. In other words, the law presumes honest and fair dealing, and bad faith or fraud is never presumed and must be established affirmatively.

Id. at 65 (footnote omitted). In *Peterson*, we further explained the good faith duty of oil and gas lessees in effectuating voluntary unitization agreements:

A lessee is bound by implied covenants in the lease to diligently explore and develop the lease, and to do so under a fair unitization plan, if unitization is effected; to market the production if the oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for the interests of both the lessor and the lessee, would do; and, in case of unitization to act fairly and in good faith, with due regard for the lessors' interest, and to provide for a fair apportionment of the oil produced.

218 F.2d at 934 (footnote omitted). Because the unitization plan at issue in *Peterson* increased efficiency of oil production, we held the lessee's unitization to be in good faith. *Id.*

A lessee's good faith is often called into question when the pooling or unitization power is exercised close to the end of the primary term, *Kramer & Martin, supra* p. 7, § 8.06[2]; *see, e.g., Amoco Prod. Co. v. Underwood*, 558 S.W.2d 509, 512-13 (Tex. Civ. App. 1977) (where unit established solely to retain leases that would otherwise expire, lessee acted in bad faith); *but see Boone*, 217 F.2d at 65-66 (mere fact that only a few months remained in lease at time of unitization did not constitute bad faith), when the lessee includes nonproductive land in the unit, *Kramer & Martin, supra* p. 7, § 8.06[2]; *see, e.g., Southwest Gas Prod. Co. v. Seale*, 191 So.2d 115, 121 (Miss. 1966), or when the lessee's economic interests are antagonistic to those of the lessor, *Kramer & Martin, supra* p. 7, § 8.06[2]. However, when and how to drill usually remains the prerogative of the driller; a mere exercise of that power contrary to the desires of the lessors or the weight of geological opinion does not, in itself, show a lack of good faith. *Diggs v. Cities Serv. Oil Co.*, 241 F.2d 425, 427 & n.2 (10th Cir. 1957). Moreover, although the lessee's duty of good faith requires that it take the lessor's interest into account in exercising its powers under the unitization clause, the lessee need not subordinate its interest entirely to those of the lessor. *See Elliott v. Davis*, 553 S.W.2d 223, 226-27 (Tex. Civ. App. 1977). Thus, although the lessee's good faith duty has at times been referred to as fiduciary, such standard is altogether too strict. *See Amoco Prod. Co. v. Jacobs*, 746 F.2d 1394, 1398-99 (10th Cir. 1984); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex. App. 1986).

A.

The district court understandably relied upon this court's opinion in *Jacobs* for the proposition that, in order to satisfy the duty of good faith, a lessee must: 1) disclose geological facts affecting the lessor's interest in the unitization; 2) cooperate with the lessor in planning the unitization; and 3) disclose any interest in the unitization adverse to the lessor. While *Jacobs* contains language that can be read to support this view, 746 F.2d at 1401, we cannot determine from the text of the opinion whether the court actually intended to create such an expansive definition of good faith.⁵ After consulting *Boone*, *Peterson* and other cases and authorities on unitization, however, we conclude for the reasons stated below that *Jacobs* did not intend to create such an unprecedented rule of good faith.

Although inclusion of geologically inferior land in the Bravo Dome unit by lessee Amoco could violate its duty of good faith, no authority imposes a duty upon lessees to produce and disclose geologic facts to a lessor

⁵ We are not alone in our inability to decipher *Jacob's* holding; several scholarly works have expressed similar difficulty. See, e.g., Kramer & Martin, *supra* p. 7, § 17.01 at 17-3 n.4 (criticizing *Jacobs*); E. Kuntz, J. Lowe, O. Anderson & E. Smith, *Cases and Materials on Oil and Gas Law*, 744 (1986) (suggesting students read *Jacobs* "[f]or a case illustrating the difficulty courts have in dealing with this question [of good faith]"). Moreover, it is apparent that the district court shared our confusion over *Jacobs* when it informed counsel: "[B]eing very frank with you, both you gentlemen on both sides are apparently . . . as confused on what [*Jacobs*] said as I am." Rec. vol. IV at 350.

comparing the lessor's mineral interest to those in the rest of the unit. Under New Mexico law, an oil or gas lease must be given the legal affect resulting from the language within the four corners of the instrument, absent ambiguity. See *Owens v. Superior Oil Co.*, 730 P.2d 458, 459 (N.M. 1986). Because the Heimanns assented to a lease which unequivocally granted Amoco the power to unitize, subject to approval by governmental authority, we decline to stray beyond the four corners of the lease to impose upon Amoco a duty to cooperate with the lessor in planning its unitization. If Amoco operated the Bravo Dome unit in a manner adverse to the Heimanns' interest, such conduct might constitute bad faith. However, no authority imposes an affirmative duty upon a lessee to disclose every interest in a unitization adverse to the lessor and we decline to create one here.

While we understand how the district court, relying upon the equivocal language in *Jacobs*, reasonably could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, we conclude that the court's instruction was too broad. Because we hold that the OCC's approval of the Bravo Dome unit renders the good faith inquiry unnecessary in this case, we do not address whether the erroneous instruction prejudiced Amoco.

B.

A good faith duty is imposed where unbridled discretion is vested in an oil or gas lessee by a unitization clause. See *Boone*, 217 F.2d at 65. If a lessee had complete discretion in unitizing an oil or gas field, the lessee

might, in bad faith, combine lessor's land with less productive land, calculate a production formula which underrepresents the lessor's mineral interest, or unitize solely to avoid the termination of a lease. But where a neutral and detached agency approves a proposed unitization after undertaking an extensive and independent study of geological, physical and economic data, the agency normally will constrain such abuses by a lessee. See *Celsius Energy*, 894 F.2d at 1240 (good faith requirement imposed to limit lessee's broad authority under pooling clauses).

A good faith duty also may serve to assure the fair allocation of oil and gas produced by the unit. See *Phillips*, 218 F.2d at 934. Where the lessee maintains complete discretion in formulating a unitization plan, the lessee might abuse that discretion and select a participation formula which underrepresents the contribution to the unit from the lessor's land. However, where an agency such as the OCC passes upon the fairness of a proposed participation formula, concerns of lessee unfairness are ameliorated. For unless a proposed unitization plan provides for a fair participation formula, it will not win OCC approval. See N.M. Stat. Ann. §§ 70-2-11, 70-2-33(H). Under New Mexico law:

If the division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons⁶ on a fair,

⁶ Although its name might suggest otherwise, the New Mexico Oil Conservation Commission and its parent, the Oil Conservation Division, maintain jurisdiction over carbon dioxide resources as well as hydrocarbons. N.M. Stat. Ann.

(Continued on following page)

reasonable and equitable basis, the division shall determine the relative value, from evidence introduced at the hearing, taking into account the separately owned tracts in the unit area, exclusive of physical equipment, for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.

N.M. Stat. Ann. 70-7-6 (B) (emphasis supplied).

Evaluating the statutory framework behind the OCC, we are convinced that it ameliorates the danger of lessee unfairness which gave rise to the good faith duty. Where approval of a unitization plan is finally determined by the OCC, the dangers resulting from the lessee's complete discretion which concerned this court in *Boone* are absent. See also *Celsius Energy*, slip op. at 6. And where the OCC approves the participation formula after a careful and independent inquiry into the relevant geophysical and economic criteria, a fair allocation of proceeds is determined without resort to the lessee's good faith duty. Therefore, because the components of a lessee's good faith duty are necessarily encompassed within the OCC's approval criteria, it is a waste of judicial resources to conduct a second good faith inquiry here.⁷

(Continued from previous page)

§ 70-2-34. Under New Mexico law, the same provisions which relate to natural gas apply to CO₂, insofar as they are applicable. *Id.*

⁷ We note that the Amoco-Heimann lease did not require approval by the New Mexico Oil Conservation Commission,

(Continued on following page)

We recognize that our analysis may conflict with language in *Jacobs* suggesting that the OCC cannot, by its "blessing" of a unitization plan, rule on the question of good faith. 746 F.2d at 1403-04. However, with all due respect, we believe the Court in *Jacobs* overlooked explicit statutory language empowering the OCC to rule on the fairness of a proposed unitization plan, see N.M. Stat. Ann. §§ 70-2-33(H), 70-7-6 (B), and ignored the proper deference owed by federal courts to the findings of state administrative agencies, see discussion *infra* at 17-20. Given the elaborate procedures required for obtaining OCC approval of a proposed unitization, as well as the technical expertise possessed by its members, it is inaccurate to describe the Commission's approval process as a mere "blessing." See N.M. Stat. Ann. §§ 70-2-4 through 70-2-10. Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said

(Continued from previous page)

but rather, "by any governmental authority." In holding that the OCC's approval of the Bravo Dome unit is conclusive on the issue of good faith, we therefore limit our holding to the OCC and recognize that a different result may prevail under a different statutory scheme. See, e.g., *Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19, 23 (Okla. 1985) (private action alleging good faith violation by unit operator was not precluded by Oklahoma Corporation Commission's previous approval of unit because action did not implicate correlative rights, as defined under Oklahoma law).

approval is conclusive on the issue of good faith. To the extent that *Jacobs* holds to the contrary, it is overruled.⁸

III.

Having concluded that a good faith inquiry is unnecessary where the fairness of a unitization plan already has been adjudged by a regulatory agency entitled to full faith and credit by a federal court, we must determine whether the OCC is entitled to such credit.

A.

Where a state agency acts in a judicial capacity, resolves facts properly before it and the parties have had an adequate opportunity to litigate, we accord the agency's decision the same preclusive effect to which it would be entitled in the state's courts. *University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986). New Mexico has granted preclusive effect to the findings of administrative agencies acting within their proper capacity. See *State v. Rio Rancho Estates, Inc.*, 624 P.2d 502, 504 (N.M. 1981); *Property Tax Dept. v. MolyCorp, Inc.*, 555 P.2d 903, 905 (N.M. 1976); *City of Socorro v. Cook*, 173 P. 682, 684-85 (N.M. 1918). However, New Mexico courts have never considered the preclusive effect of an OCC decision. Applying the standard enunciated by the New Mexico

⁸ Because this panel opinion overrules Tenth Circuit precedent, it has been circulated among all active judges of this court. All judges agree with the panel's holding that, because Amoco's good faith was necessarily encompassed within the OCC's consideration of the Bravo Dome unit, the Commission's approval of said unitization is conclusive on the question of Amoco's good faith.

courts, we therefore consult general principles of preclusion to anticipate the effect of the OCC approval of the Bravo Dome unit.

When an agency's function resembles that of a trial court, the agency adjudication is entitled to preclusive effect. 4 K. Davis, *Administrative Law Treatise* § 21:3 at 51-52 (1983). Conversely, where the agency's action is merely ministerial, *res judicata* and collateral estoppel do not attach. *Id.* In determining whether the administrative agency was "acting in a judicial capacity," *Elliott*, 478 U.S. at 799, no single model of procedural fairness is dictated by the due process clause, *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 483 (1981). Rather, we must look to our prior cases as well as the *Restatement (Second) Judgments* § 83⁹ to

⁹ The Restatement provides in pertinent part:

§ 83. Adjudicative Determination by Administrative Tribunal.

...

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of *res judicata* only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication . . .

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(Continued on following page)

determine whether the OCC acts in a judicial capacity when it approves a proposed unitization plan.

In *Long v. Laramie County Community College Dist.*, 840 F.2d 743 (10th Cir.), *cert. denied*, 109 S.Ct. 73 (1988), we held that a state college grievance committee's finding that an employee had been harassed sexually was preclusive in a subsequent action brought under 42 U.S.C. §§ 1983, 1985. Because most of the parties before the grievance committee had been represented by counsel, witnesses were cross-examined, documentary evidence

(Continued from previous page)

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specific parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

. . . .

Restatement (Second) Judgments § 83 at 266-67 (1982).

Although this section specifically refers to "res judicata," or claim preclusion, it also applies to collateral estoppel, issue preclusion. *Id. comment b* at 270-71.

was introduced in accordance with Wyoming APA and the committee rendered findings and recommendations which were reviewed by College's Board of Trustees, we concluded that the commission was acting in a judicial capacity under *Elliott*.¹⁰ *Id.* at 751. In *Katter v. Arkansas La. Gas*, 765 F.2d 730 (8th Cir. 1985), the Eighth Circuit similarly held that an integration order by the Arkansas Oil and Gas Commission was entitled to full faith and credit in a subsequent action brought in federal court:

Clearly the Arkansas legislature intended an adjudicatory, *in rem* order [by the Oil and Gas Commission] which, when final, would have all the force and effect of a court judgment; and in fact required and provided for all the things necessary to give it that effect. (citation omitted). In general, then, such an order would fix the parties' rights and duties as fully and finally as a court judgment – albeit here a default judgment – and would be entitled to the same full faith and credit and preclusive effect.

Id. at 734.

¹⁰ Both *Elliott* and *Long* considered whether state administrative fact findings are preclusive in a federal cause of action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico courts. See *Braselton v. Clearfield State Bank*, 606 F.2d 285, 287 & n. 1 (10th Cir. 1979). We therefore rely upon *Elliott* and *Long* only for general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

B.

The New Mexico Oil Conservation Commission consists of three persons: a designee of the Commissioner of Public Lands, a designee of the Secretary of Energy, Minerals and Natural Resources and the Director of the Oil Conservation Division. N.M. Stat. Ann. § 70-2-4. The two designated members must be "persons who have expertise in the regulation of petroleum production by virtue of education or training," *id.*, while the third member must either be a registered petroleum engineer or else, by virtue of education and experience, have experience in petroleum engineering. N.M. Stat. Ann. § 70-2-5(B). The OCC has authority to subpoena witnesses, compel testimony and require production of books, papers and records relative to matters within the commission's jurisdiction. N.M. Stat. Ann. § 70-2-8. OCC members may administer oaths to any witness in any proceeding; a person who testifies falsely under oath before the commission is guilty of perjury. N.M. Stat. Ann. § 70-2-10. Hearings of the OCC are held in public, N.M. Oil Conservation Div. R. 1201 (1989), after providing interested parties with notice, N.M. Oil Conservation Div. R. 1204-07, and may be initiated upon the motion of any operator, producer or person having a pertinent property interest. N.M. Oil Conservation Div. R. 1203. All pleadings before the OCC must be mailed to adverse parties, N.M. Oil Conservation Div. R. 1208, and all testimony delivered before the Commission must be formally recorded, N.M. Oil conservation Div. R. 1210. Any person testifying under subpoena or in support of or in opposition to a motion before the Commission must do so under oath. *Id.* The OCC's procedural rules further provide:

Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

N.M. Oil Conservation Div. R. 1212. In reaching a decision, the OCC must make written findings of fact that have sufficient support in the record. *Fasken v. Oil Conservation Comm'n*, 532 P.2d 588, 590 (N.M. 1975). Any party adversely affected by an order of the Commission may petition for rehearing, N.M. Stat. Ann. § 70-2-25(A); any party dissatisfied with the disposition of the rehearing may appeal to the state district court, N.M. Stat. Ann. § 70-2-25(B), where the OCC's utilization decision is reviewed for substantial evidence, *Viking Petroleum v. Oil Conservation Comm'n*, 672 P.2d 280, 282 (N.M. 1983). Although New Mexico courts will accord "[s]pecial weight . . . to the experience, technical competence and specialized knowledge of the Commission[.]" *id.*, the OCC's findings must be based on ultimate facts involving "foundational matters," and "basic conclusions of fact[.]" *Continental Oil v. Oil Conservation Comm'n*, 373 P.2d 809, 814-15 (N.M. 1962).

Applying *Long* and the criteria enunciated in *Restatement (Second) Judgments* § 83, we are satisfied that the OCC's approval process is entitled to preclusive effect. As parties interested in the OCC's proceedings, the Heimanns received notice of the proposed adjudication, *see id.* § 83(2)(a), and, at least during the rehearing, were

represented by counsel, *see Long*, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimanns's enjoyed the opportunity to cross-examine Amoco's witnesses and present evidence and legal argument of their own. *See id.*; *Restatement (Second) Judgments* § 83(2)(b). The OCC's order approving the Bravo Dome unit formulated the issues of law and fact in terms of their specific application to the Heimanns correlative rights, *see id.* § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, *see id.* § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo dome unit; its decision is therefore entitled to preclusive effect. *See City of Socorro*, 173 P. at 684-85.

IV.

Having concluded that the OCC's approval of the Bravo Dome unit is entitled to full faith and credit, we must now determine whether the Heimanns are collaterally estopped from challenging the fairness of the participation formula adopted as part of the unitization plan. Federal courts must apply the law of the state rendering the judgment to determine its collateral estoppel effect; we may not accord greater preclusive effect to a state court judgment than would the state in which the judgment is rendered. *Federal Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383, 385 (10th Cir. 1987); *see C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction* § 4472 (1981).

A.

This court previously has recognized that decision by state oil conservation agencies may be entitled to collateral estoppel effect. In *Chenoweth v. Pan Am. Petroleum*, 314 F.2d 63, 65 (10th Cir. 1963), a lessor of unitized mineral interests sought cancellation of an oil and gas lease. Because the participation formula had been decided upon previously by the Oklahoma Corporation Commission, we concluded that the lessor's action constituted an improper collateral attack upon the Commission's authority.

The Oklahoma Corporation Commission has unitized the Oil Creek in this area and [plaintiffs] participate in this production under the established formula. Appellant . . . objects to this unitization order and has an appeal pending on this matter in the Supreme Court of Oklahoma. He attempts to litigate the validity of this order on this appeal, but this cannot be done under these circumstances. To do so would clearly be a collateral attack on the order of the Commission.

Id. Other circuits have also recognized that unitization orders by state oil conservation agencies must remain inviolate to collateral attack. See, e.g., *Katter*, 765 F.2d at 734 (Arkansas law); *Trahan v. Superior Oil*, 700 F.2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); *Mize v. Exxon*, 640 F.2d 637, 640 (5th Cir. 1981) (Alabama law). But where a subsequent action does not directly or indirectly challenge a previous order by a state oil conservation commission, collateral estoppel and res judicata do not attach. See, e.g., *Greyhound Leasing & Financial Corp. v. Joiner City Unit*, 444 F.2d 439, 445 (10th Cir. 1971) (lessor's action

against unit operator for damages caused by secondary recovery methods did not constitute collateral attack to any order of the Oklahoma Corporation Commission); *Richardson v. Phillips Petroleum*, 791 F.2d 641, 646 (8th Cir. 1986) (because denial of money damages was not necessarily encompassed in Arkansas Oil and Gas Commission's denial of injunctive relief halting secondary recovery operations, Commission's decision did not bar subsequent action for money damages).

B.

New Mexico traditionally requires four elements for the invocation of collateral estoppel: 1) the parties are the same or are privies of the original parties; 2) the cause of action is different; 3) the issue or fact was actually litigated; and 4) the issue was necessarily determined. *International Paper Co. v. Farrar*, 700 P.2d 642, 644-45 (N.M. 1985). We address these criteria in turn.

Same Parties: The Heimanns were included among the designated parties who sought and obtained rehearing of the OCC's approval of the Bravo Dome unit. They were also among the persons seeking reversal of the OCC's order in the state district court and the New Mexico Supreme Court.

Different Cause of Action: The administrative proceedings before the OCC and judicial proceedings before the New Mexico courts concerning the approval of the Bravo Dome unit constituted a separate and distinct cause of action from the present action in federal court alleging bad faith on behalf of Amoco.

Issue Actually Litigated: New Mexico employees two criteria for determining whether a proposed unitization may be approved by the OCC: 1) prevention of waste and, 2) protection of correlative rights. N.M. Stat. Ann. § 70-2-11. New Mexico defines correlative rights as follows:

"correlative rights" means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a pool to produce without waste his *just and equitable share* of the oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially *in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and*, for such purposes, to use his just and equitable share of the reservoir energy.

N.M. Stat. Ann § 70-2-33(H) (emphasis supplied). Taking the plain meaning of the relevant statute, inherent among the OCC's criteria for approving a unitization plan is the fairness of the participation formula. *See also* N.M. Stat. Ann. § 70-7-6 (B) (quoted on p. 15, *supra*). In this case, the Heimanns argue that the per-acre allocation of CO₂ revenues under the participation agreement did not fairly represent the quantity of recoverable CO₂ under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such

rights, we must conclude that the fairness of the Bravo Dome Unit participation plan was "actually litigated" before the OCC. See *Chenoweth*, 314 F.2d at 65; *Katter*, 765 F.2d at 734.

Issue Necessarily Determined: Although New Mexico accords preclusive effect to the adjudications of administrative agencies in subsequent judicial proceedings, in order to have such effect, the administrative findings must have addressed questions which were essential to the agency's decision. See *Rio Rancho Estates*, 624 P.2d at 504. As stated above, in order to approve a unitization plan, the OCC *must* find that the participation formula protects the correlative rights of all pertinent parties. See N.M. Stat. Ann. § 70-2-11. And in order to determine that the Bravo Dome unitization protected the Heimanns' correlative rights, it was essential that the OCC rule upon the fairness of the unit's participation formula.¹¹

¹¹ The Heimanns cite this court's recent opinion of *Leck v. Continental Oil Co.*, 892 F.2d 68 (10th Cir. 1989), for the proposition that collateral estoppel should not attach to the findings of the OCC. In *Leck*, we certified to the Oklahoma Supreme Court several questions concerning the jurisdiction of the Oklahoma Corporation Commission vis a vis the state courts. *Id.* at 68. Applying Oklahoma law, the Supreme Court held that the district court, not the Corporation Commission, had *jurisdiction* over a lessor's claim against the unit operator for breach of contract and violation of the operator's fiduciary duty to protect lessor's correlative rights. *Leck v. Continental Oil Co.*, ___ P.2d ___, No. 72,054, slip op. at 8, 10 (Okla. Nov. 28, 1989). The Oklahoma court limited its holding to the jurisdictional question and explicitly declined to address the *res judicata* or collateral estoppel effect of the prior adjudication before the

(Continued on following page)

"[C]ollateral estoppel not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review, undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns' correlative rights would be accorded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

The district court shall vacate the judgment in favor of the Heimanns and enter judgment in favor of Amoco consistent with this opinion.¹²

REVERSED and REMANDED.

(Continued from previous page)

Commission. *Id.* at 8. Accordingly, to the extent that the Heimanns rely upon *Leck* to argue that collateral estoppel should not attach to the findings of the OCC, their reliance is misplaced.

¹² Because we reverse the judgement of the district court, we need not consider the additional issues raised by Amoco on appeal or address the Heimanns' cross-appeal.

APPENDIX B
PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AMOCO PRODUCTION)
 COMPANY,)

Plaintiff-Counterdefendant-)
 Appellant and Cross-Appellee,)

vs.)

J. CASPER HEIMANN; OWAISSA)
 HEIMANN, his wife; ROBERTA)
 NELSON; BOBBY D. ADEE;)
 HOWARD W. ROBERTSON;)
 PAULINE ROBERTSON, his wife;)
 JOHNNAN ADEE, as Trustee)

for SHARON ADEE and DOWLEN)
 ADEE; J. CASPER HEIMANN,)

as Trustee for RANDALL)

LYNN HEIMANN, JAY DEE)

HEIMANN, GENE ALVIN)

HEIMANN and RUSSELL GARY)

HEIMANN; PAULINE)

ROBERTSON, as Trustee)

for VAN HOWARD ROBERTSON;)

DEANA SHUGART, a married)

woman dealing in her sole)

and separate estate; and)

JOHNNAN ADEE, in her)

capacity as Personal Representative)

of the Estate of Fred P. Heimann,)

deceased,)

Defendants-Counterclaimants-)

Appellees and Cross-)

Appellants.)

Nos.
 88-2070, 88-2072
 88-2255, 88-2355

(Filed
 May 24, 1990)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF NEW MEXICO
(D.C. No. CV-84-1430)

William F. Carr (Michael B. Campbell & John H. Bemis, with him on the brief), Campbell & Black, Santa Fe, New Mexico, for Plaintiff-Counterdefendant-Appellant and Cross-Appellee.

Steven L. Tucker (Jerry Wertheim & Arturo L. Jaramillo, with him on the brief), Jones, Snead, Wertheim, Rodriguez & Wentworth, Santa Fe, New Mexico, for Defendants-Counterclaimants-Appellees and Cross-Appellants.

Charles L. Kaiser and Mary A. Viviano, Davis, Graham & Stubbs, Denver, Colorado, filed an amicus curiae brief for the Rocky Mountain Oil and Gas Association.

Paul A. Cooter, Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, filed an amicus curiae brief for the New Mexico Oil and Gas Association.

Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS, District Judge.*

BALDOCK, Circuit Judge.

Amoco Production Company (Amoco) appeals from a \$4 million judgment arising out of its unitization of a carbon dioxide field in northeastern New Mexico. Amoco argues, *inter alia*, that the district court 1) misinstructed

*The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

the jury on an oil or gas lessee's duty of good faith, and 2) improperly failed to accord collateral estoppel effect to the findings of the New Mexico Oil Conservation Commission (OCC). Our jurisdiction over this diversity case arises under 28 U.S.C. § 1291. We hold that 1) a good faith inquiry into an oil and gas lessee's conduct is unnecessary where the unitization previously was approved by an independent state agency which passes on the fairness of the participation formula, such as the OCC, and 2) the OCC's approval of the unitization plan in this case has collateral estoppel effect upon the appellees' challenge to the unit's allocation formula. Accordingly, we reverse.

I.

Defendants-Counterclaimants-Appellees (the Heimanns) are a family of ranchers who have lived in northeastern New Mexico since the early part of this century. The Heimanns own 48,120 acres of ranch land in Union, Quay and Harding Counties, New Mexico. Between 1971 and 1974, the Heimanns executed three carbon dioxide (CO₂) and mineral leases with Amoco. Each of these three leases contained a unitization clause which granted Amoco the right to unitize the Heimanns' mineral interests with other lands in the area, subject to approval "by any governmental authority." The leases granted the Heimanns a one-eighth royalty of the net proceeds received from all oil, gas or CO₂ produced on their lands.

In the late 1970's, Amoco embarked upon a plan to pipe CO₂ from northern New Mexico to its west Texas oil

fields in order to enhance recovery there. Amoco therefore sought to unitize the mineral rights to approximately 1,174,225 acres of land in Harding, Union and Quay Counties, including the Heimanns's land.¹ The proposed agreement for the "Bravo Dome" unit allocated royalties on the basis of "surface acreage;" production was allocated according to the total surface areas contained in each tract. Amoco sought approval of the Bravo Dome unit from the OCC.² The Commission found that "approval of the proposed unit agreement should promote the preventions of waste and the protection of correlative rights within the unit area" and consequently approved the unit agreement. *Amoco Prod. Co.*, No. R-6446, unpub. order at 1 (N.M. Oil. Conservation Comm'n Aug. 14, 1980).

Together with other opponents of the Bravo Dome unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns and other opponents of the unit appeared before the OCC and presented evidence that the per-acre participation formula did not protect their correlative rights. The OCC found in pertinent part:

¹ Amoco held a 74% working interest in the unitized lands.

² Although its name might suggest otherwise, the New Mexico Oil Conservation Commission and its parent, the Oil Conservation Division, maintain jurisdiction over carbon dioxide resources as well as hydrocarbons. N.M. Stat. Ann. § 70-2-34. Under New Mexico law, the same provisions which relate to natural gas apply to CO₂, insofar as they are applicable. *Id.*

(14) That are evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

- (a) a formula which provides that each owner in the unit shall share in the production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and
- (b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste which is fair to the owners of interests therein.

Amoco Prod. Co., No. R-6446-B, unpub. order at 3-4 (N.M. Oil. Conservation Comm'n Jan. 23, 1981).

The Heimanns appealed the OCC's order on rehearing to the New Mexico state district court for Taos County. They argued that there was not substantial evidence supporting the OCC's determination that the proposed unitization would protect their correlative rights. The district court, however, affirmed the Commission. *Casados v. Oil Conservation Comm'n*, No. 81-176, unpub. order at 4 (N.M. 8th Dist. Apr. 5, 1982). The Heimanns appealed the district court's order to the New Mexico Supreme Court which affirmed. *Casados v. Oil Conservation Comm'n*, No. 14,359, unpub. order at 8 (N.M. Nov. 10, 1983). The Supreme Court held that the record contained "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected." *Id.*

In 1984, Amoco filed suit against the Heimanns in federal district court seeking a declaratory judgment under 28 U.S.C. § 2201(a) that Amoco had properly unitized the interests covered under the leases. The Heimanns counterclaimed alleging three theories of recovery: 1) unfair allocation of royalties under the unitization agreement; 2) undervaluation of the extracted

CO₂; and 3) surface damage. At the conclusion of the trial, the court instructed the jury on the components of Amoco's good faith duty which it was obliged to follow in exercising its powers under the unitization clause:

INSTRUCTION NO. 18

Amoco's duty of good faith is not fulfilled merely by refraining from dishonest conduct. Rather, Amoco has certain affirmative duties which it must fulfill as a prerequisite to a finding of good faith. These are:

(a) Disclosure to the Heimanns of the material facts affecting their interest in the proposed unitization, including the geological and geophysical characteristics of their lands compared with that of other lands within the proposed unit area, and the significance of that data as it affects the Heimanns' interest;

(b) Cooperation with the Heimanns in planning the unitization program. Such cooperation may consist of communicating to the extent possible with the Heimanns in an effort to impart pertinent knowledge to the Heimanns; and

(c) Disclosure to the Heimanns of any interests of Amoco in unitization which were adverse to the interest of the Heimanns.

The jury returned a special verdict in favor of Amoco on the fair market value and surface damage claims, but found for the Heimanns on the royalty allocation charge. The jury awarded the Heimanns damages in the amount of \$3,500,000 compensatory damages and \$500,000 punitive damages. The district court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns lands void.

II.

Unitization refers to the consolidation of mineral or leasehold interests in oil or gas covering a common source of supply.³ 1 B. Kramer & P. Martin, *The Law of Pooling and Unitization* § 1.02 at 1-3 (3d ed. 1989); see *Parkin v. Corporation Comm'n of Kansas*, 677 P.2d 991, 1002 (Kan. 1984). Unitization resulted from state legislatures' efforts to modify the rule of capture which had previously been applied to oil and gas law. See *Clark Oil Prod. Co. v. Hodel*, 667 F. Supp. 281, 290 (D.N.D. 1982); Kramer & Martin, *supra* p. 7, § 3.02. The goals of unitization are conserving resources by preventing waste and protecting landowners' correlative rights.⁴ See, e.g., N.M. Stat. Ann. § 70-2-11 (1987 Rep. Pamp.). Following unitization of an oil field, the royalty clause of a oil and gas lease generally is modified and the lessor becomes entitled to a royalty based on a pro rate share of the production attributable to its land, regardless of whether production is from that land or another tract included within the unit. Williams & Meyers, *supra* n. 2, § 951 at 694.12. The working interest

³ While frequently used interchangeably, the terms "pooling" and "unitization" refer to separate procedures. Pooling involves combination of several small tracts of land to meet the spacing requirements for a single well. Unitization refers to field-wide or partial field-wide operation of a producing reservoir involving multiple adjoining land tracts. 6 H. Williams & C. Meyers, *Oil and Gas Law* § 901 at 2 (1989); R. Hemingway, *Law of Oil and Gas* § 7.13 (1983).

⁴ "Correlative rights" are "rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply." *United Petroleum Exploration v. Premier Resources*, 511 F. Supp. 127, 129 (W.D. Okla. 1980).

owners' share is based on a participation formula calculated from geological, physical and economic data. Kramer & Martin, *supra* p. 7, § 17.02[5]. No single method of calculating the participation formula is appropriate for all situations, Williams & Meyers, *supra* n. 2, § 970 at 816.5, and although the most frequently employed basis for allocating unitized production is surface acreage, *id.* § 970.1 at 816.6, arriving at a perfect participation agreement is impossible. Kramer & Martin, *supra* p. 7, § 17.02[5][a] at 17-16. As this court has explained:

The percentage of an estimated pool recovery under a unitized operation assigned to a particular lease represents at best only an estimated contribution from that tract under a single unitized operation. Without more, it cannot be taken as evidence of the estimated recovery therefrom under an independent, individual operation of the lease.

Stanolind Oil & Gas Co. v. Sellers, 174 F.2d 948, 956 (10th Cir.), *cert. denied*, 338 U.S. 867 (1949).

Two methods exist where by separately-owned tracts can be combined in a single unit: voluntary unitization by contract or forced unitization by regulatory authority. See Douglass, *Powers and Problems of Lessee Pooling*, 34 Sw. Legal Fed'n Oil & Gas Inst. 231 (1983). Because the Bravo Dome unit resulted from Amoco's voluntary petition to the OCC, we concern ourselves here with voluntary unitization.

The unitization clause of an oil and gas lease grants the lessee the power to unitize the lessors interest without further consent by the lessor.⁵ Kramer & Martin, *supra*

⁵ Such clauses can be said to effectuate voluntary pooling or unitization in that the pooling or unitization is not

p. 7, § 8.01 at 8-1; Hemingway, *supra* n. 2, § 7.13. Without such a clause, the lessee has no authority to pool or unitize the interests of the lessor. Kramer & Martin, *supra* p. 7, § 8.01 at 8-2. See also *Celsius Energy Co. v. Mid Am. Petroleum*, 894 F.2d 1238, 1240 (10th Cir. 1990) (language of lease determines extent of lessee's pooling authority). Because neither the lessor nor the lessee usually know the relevant facts concerning the need for unitization at the time the lease is signed, unitization clause must be framed in general terms. *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 933 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955); Kramer & Martin, *supra* p. 7, § 8.01 at 8-2; Hemingway, *supra* n. 2, § 7.13 (unitization clauses in oil and gas leases are to be interpreted liberally). But see *Leonard v. Barnes*, 404 P.2d 292, 301 (N.M. 1965) (where an oil and gas lease contains no express provision to unitize, courts will not strain to interpret contract to provide for unitization or pooling).

In addition to contractual limitations on the exercise of the lessee's unitization power, an oil and gas lessee owes the lessor the additional duty of fair dealing, often stated in terms of good faith. Kramer & Martin, *supra* p. 7, § 8.06 at 8-32; Hemingway, *supra* n. 2, § 7.13. In *Boone v. Kerr-McGee Oil Indus.*, 217 F.2d 63 (10th Cir. 1954), this court explained that the good faith duty is necessary

(Continued from previous page)

compelled by state authority. On the other hand, because such clauses inevitably vest the lessee with the unilateral power to pool or unitize, the pooling or unitization implemented under such clauses is not voluntary for the lessor. See Kramer & Martin, *supra* p. 7, § 8.02 at 8-2.

because of the unilateral power vested in the lessee by a unitization clause:

Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for the exercise of such power. All the authorities are to this effect.

In approaching a consideration of this question, we keep in mind a further principle and that is that the law presumes that men will act honestly and fairly in dealing with each other. In other words, the law presumes honest and fair dealing, and bad faith or fraud is never presumed and must be established affirmatively.

Id. at 65 (footnote omitted). In *Peterson*, we further explained the good faith duty of oil and gas lessees in effectuating voluntary unitization agreements:

A lessee is bound by implied covenants in the lease to diligently explore and develop the lease, and to do so under a fair unitization plan, if unitization is effected; to market the production if the oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for the interests of both the lessor and the lessee, would do; and, in case of unitization to act fairly and in good faith, with due regard for the lessors' interests, and to provide for a fair apportionment of the oil produced.

218 F.2d at 934 (footnote omitted). Because the unitization plan at issue in *Peterson* increased efficiency of oil production, we held the lessee's unitization to be in good faith. *Id.*

A lessee's good faith is often called into question when the pooling or unitization power is exercised close to the end of the primary term, *Kramer & Martin, supra* p. 7, § 8.06[2]; *see, e.g., Amoco Prod. Co. v. Underwood*, 558 S.W.2d 509, 512-13 (Tex. Civ. App. 1977) (where unit established solely to retain leases that would otherwise expire, lessee acted in bad faith); *but see Boone*, 217 F.2d at 65-66 (mere fact that only a few months remained in lease at time of unitization did not constitute bad faith), when the lessee includes nonproductive land in the unit, *Kramer & Martin, supra* p. 7, § 8.06[2]; *see, e.g., Southwest Gas Prod. Co. v. Seale*, 191 So.2d 115, 121 (Miss. 1966), or when the lessee's economic interests are antagonistic to those of the lessor, *Kramer & Martin, supra* p. 7, § 8.06[2]. However, when and how to drill usually remains the prerogative of the driller; a mere exercise of that power contrary to the desires of the lessors or the weight of geological opinion does not, in itself, show a lack of good faith. *Diggs v. Cities Serv. Oil Co.*, 241 F.2d 425, 427 & n.2 (10th Cir. 1957). Moreover, although the lessee's duty of good faith requires that it take the lessor's interest into account in exercising its powers under the unitization clause, the lessee need not subordinate its interest entirely to those of the lessor. *See Elliott v. Davis*, 553 S.W. 2d 223, 226-27 (Tex. Civ. App. 1977). Thus, although the lessee's good faith duty has at times been referred to as fiduciary, such standard is altogether too strict. *See Amoco Prod. Co. v. Jacobs*, 746 F.2d 1394, 1398-99 (10th Cir. 1984); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex. App. 1986).

A.

The district court understandably relied upon this court's opinion in *Jacobs* for the proposition that, in order to satisfy the duty of good faith, a lessee must: 1) disclose geological facts affecting the lessor's interest in the unitization; 2) cooperate with the lessor in planning the unitization; and 3) disclose any interest in the unitization adverse to the lessor. While *Jacobs* contains language that can be read to support this view, 746 F.2d at 1401, we cannot determine from the text of the opinion whether the court actually intended to create such an expansive definition of good faith.⁶ After consulting *Boone*, *Peterson* and other cases and authorities on unitization, however, we conclude for the reasons stated below that *Jacobs* did not intend to create such an unprecedented rule of good faith.

Although inclusion of geologically inferior land in the Bravo Dome unit by lessee Amoco could violate its duty of good faith, no authority imposes a duty upon lessees to produce and disclose geologic facts to a lessor

⁶ We are not alone in our inability to decipher *Jacob's* holding; several scholarly works have expressed similar difficulty. See, e.g., Kramer & Martin, *supra* p. 7, § 17.01 at 17-3 n.4 (criticizing *Jacobs*); E. Kuntz, J. Lowe, O. Anderson & E. Smith, *Cases and Materials on Oil and Gas Law*, 744 (1986) (suggesting students read *Jacobs* "[f]or a case illustrating the difficulty courts have in dealing with this question [of good faith]"). Moreover, it is apparent that the district court shared our confusion over *Jacobs* when it informed counsel: "[B]eing very frank with you, both you gentlemen on both sides are apparently . . . as confused on what [*Jacobs*] said as I am." Rec. vol. IV at 350.

comparing the lessor's mineral interests to those in the rest of the unit. Under New Mexico law, an oil or gas lease must be given the legal affect resulting from the language within the four corners of the instrument, absent ambiguity. See *Owens v. Superior Oil Co.*, 730 P.2d 458, 459 (N.M. 1986). Because the Heimanns assented to a lease which unequivocally granted Amoco the power to unitize, subject to approval by governmental authority, we decline to stray beyond the four corners of the lease to impose upon Amoco a duty to cooperate with the lessor in planning its unitization. If Amoco operated the Bravo Dome unit in a manner adverse to the Heimanns' interest, such conduct might constitute bad faith. However, no authority imposes an affirmative duty upon a lessee to disclose every interest in a unitization adverse to the lessor and we decline to create one here.

While we understand how the district court, relying upon the equivocal language in *Jacobs*, reasonably could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, we conclude that the court's instruction was too broad. Because we hold that the OCC's approval of the Bravo Dome unit renders the good faith inquiry unnecessary in this case, we do not address whether the erroneous instruction prejudiced Amoco.

B.

A good faith duty is imposed where unbridled discretion is vested in an oil or gas lessee by a unitization clause. See *Boone*, 217 F.2d at 65. If a lessee had complete discretion in unitizing an oil or gas field, the lessee

might, in bad faith, combine lessor's land with less productive land, calculate a production formula which underrepresents the lessor's mineral interest, or unitize solely to avoid the termination of a lease. But where a neutral and detached agency approves a proposed unitization after undertaking an extensive and independent study of geological, physical and economic data, the agency normally will constrain such abuses by a lessee. See *Celsius Energy*, 894 F.2d at 1240 (good faith requirement imposed to limit lessee's broad authority under pooling clauses).

A good faith duty also may serve to assure the fair allocation of oil and gas produced by the unit. See *Phillips*, 218 F.2d at 934. Where the lessee maintains complete discretion in formulating a unitization plan, the lessee might abuse that discretion and select a participation formula which underrepresents the contribution to the unit from the lessor's land. However, where an agency such as the OCC passes upon the fairness of a proposed participation formula, concerns of lessee unfairness are ameliorated. For unless a proposed unitization plan provides for a fair participation formula, it will not win OCC approval. See N.M. Stat. Ann. §§ 70-2-11, 70-2-33(H); see also N.M. Stat. Ann. § 70-7-6 (B) (approval criteria under Statutory Unitization Act).

Evaluating the statutory framework behind the OCC, we are convinced that it ameliorates the danger of lessee unfairness which gave rise to the good faith duty. Where approval of a unitization plan is finally determined by the OCC, the dangers resulting from the lessee's complete discretion which concerned this court in *Boone* are absent. See also *Celsius Energy*, slip op. at 6. And where the OCC

approves the participation formula after a careful and independent inquiry into the relevant geophysical and economic criteria, a fair allocation of proceeds is determined without resort to the lessee's good faith duty. Therefore, because the components of a lessee's good faith duty are necessarily encompassed within the OCC's approval criteria, it is a waste of judicial resources to conduct a second good faith inquiry here.⁷

We recognize that our analysis may conflict with language in *Jacobs* suggesting that the OCC cannot, by its "blessing" of a unitization plan, rule on the question of good faith. 746 F.2d at 1403-04. However, with all due respect, we believe the Court in *Jacobs* overlooked explicit statutory language empowering the OCC to rule on the fairness of a proposed unitization plan, *see* N.M. Stat. Ann. §§ 70-2-33(H); *cf.* N.M. Stat. Ann. § 70-7-6 (B), and ignored the proper deference owed by federal courts to the findings of state administrative agencies, *see* discussion *infra* at 17-20. Given the elaborate procedures required for obtaining OCC approval of a proposed unitization, as well as the technical expertise possessed by its

⁷ We note that the Amoco-Heimann lease did not require approval by the New Mexico Oil Conservation Commission, but rather, "by any governmental authority." In holding that the OCC's approval of the Bravo Dome unit is conclusive on the issue of good faith, we therefore limit our holding to the OCC and recognize that a different result may prevail under a different statutory scheme. *See, e.g., Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19, 23 (Okla. 1985) (private action alleging good faith violation by unit operator was not precluded by Oklahoma Corporation Commission's previous approval of unit because action did not implicate correlative rights, as defined under Oklahoma law).

members, it is inaccurate to describe the Commission's approval process as a mere "blessing." See N.M. Stat. Ann. §§ 70-2-4 through 70-2-10. Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. To the extent that *Jacobs* holds to the contrary, it is overruled.⁸

III.

Having concluded that a good faith inquiry is unnecessary where the fairness of a unitization plan already has been adjudged by a regulatory agency entitled to full faith and credit by a federal court, we must determine whether the OCC is entitled to such credit.

A.

Where a state agency acts in a judicial capacity, resolves facts properly before it and the parties have had an adequate opportunity to litigate, we accord the agency's decision the same preclusive effect to which it would be entitled in the state's courts. *University of Tenn.*

⁸ Because this panel opinion overrules Tenth Circuit precedent, it has been circulated among all active judges of this court. All judges agree with the panel's holding that, because Amoco's good faith was necessarily encompassed within the OCC's consideration of the Bravo Dome unit, the Commission's approval of said unitization is conclusive on the question of Amoco's good faith.

v. Elliott, 478 U.S. 788, 799 (1986). New Mexico has granted preclusive effect to the findings of administrative agencies acting within their proper capacity. See *State v. Rio Rancho Estates, Inc.*, 624 P.2d 502, 504 (N.M. 1981); *Property Tax Dept. v. MolyCorp, Inc.*, 555 P.2d 903, 905 (N.M. 1976); *City of Socorro v. Cook*, 173 P. 682, 684-85 (N.M. 1918). However, New Mexico courts have never considered the preclusive effect of an OCC decision. Applying the standard enunciated by the New Mexico courts, we therefore consult general principles of preclusion to anticipate the effect of the OCC approval of the Bravo Dome unit.

When an agency's function resembles that of a trial court, the agency adjudication is entitled to preclusive effect. 4 K. Davis, *Administrative Law Treatise* § 21:3 at 51-52 (1983). Conversely, where the agency's action is merely ministerial, *res judicata* and collateral estoppel do not attach. *Id.* In determining whether the administrative agency was "acting in a judicial capacity," *Elliott*, 478 U.S. at 799, no single model of procedural fairness is dictated by the due process clause, *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 483 (1981). Rather, we must look to our prior cases as well as the *Restatement (Second) Judgments* § 83⁹ to

⁹ The Restatement provides in pertinent part:

§ 83. Adjudicative Determination by Administrative Tribunal.

...

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of *res*

(Continued on following page)

determine whether the OCC acts in a judicial capacity when it approves a proposed unitization plan.

(Continued from previous page)

judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication . . .

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specific parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

. . . .

Restatement (Second) Judgments § 83 at 266-67 (1982).

Although this section specifically refers to "res judicata," or claim preclusion, it also applies to collateral estoppel, issue preclusion. *Id.* comment b at 270-71.

In *Long v. Laramie County Community College Dist.*, 840 F.2d 743 (10th Cir.), *cert. denied*, 109 S.Ct. 73 (1988), we held that a state college grievance committee's finding that an employee had been harassed sexually was preclusive in a subsequent action brought under 42 U.S.C. §§ 1983, 1985. Because most of the parties before the grievance committee had been represented by counsel, witnesses were cross-examined, documentary evidence was introduced in accordance with Wyoming APA and the committee rendered findings and recommendations which were reviewed by College's Board of Trustees, we concluded that the commission was acting in a judicial capacity under *Elliott*.¹⁰ *Id.* at 751. In *Katter v. Arkansas La. Gas*, 765 F.2d 730 (8th Cir. 1985), the Eighth Circuit similarly held that an integration order by the Arkansas Oil and Gas Commission was entitled to full faith and credit in a subsequent action brought in federal court:

Clearly the Arkansas legislature intended an adjudicatory, *in rem* order [by the Oil and Gas Commission] which, when final, would have all the force and effect of a court judgment; and in fact required and provided for all the things

¹⁰ Both *Elliott* and *Long* considered whether state administrative fact findings are preclusive in a federal cause of action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico courts. See *Braselton v. Clearfield State Bank*, 606 F.2d 285, 287 & n. 1 (10th Cir. 1979). We therefore rely upon *Elliott* and *Long* only for general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

necessary to give it that effect. (citation omitted). In general, then, such an order would fix the parties' rights and duties as fully and finally as a court judgment – albeit here a default judgment – and would be entitled to the same full faith and credit and preclusive effect.

Id. at 734.

B.

The New Mexico Oil Conservation Commission consists of three persons: a designee of the Commissioner of Public Lands, a designee of the Secretary of Energy, Minerals and Natural Resources and the Director of the Oil Conservation Division. N.M. Stat. Ann. § 70-2-4. The two designated members must be "persons who have expertise in the regulation of petroleum production by virtue of education or training," *id.*, while the third member must either be a registered petroleum engineer or else, by virtue of education and experience, have experience in petroleum engineering. N.M. Stat. Ann. § 70-2-5(B). The OCC has authority to subpoena witnesses, compel testimony and require production of books, papers and records relative to matters within the commission's jurisdiction. N.M. Stat. Ann. § 70-2-8. OCC members may administer oaths to any witness in any proceeding; a person who testifies falsely under oath before the commission is guilty of perjury. N.M. Stat. Ann. § 70-2-10. Hearings of the OCC are held in public, N.M. Oil Conservation Div. R. 1201 (1989), after providing interested parties with notice, N.M. Oil Conservation Div. R. 1204-07, and may be initiated upon the motion of any operator, producer or person having a pertinent property interest.

N.M. Oil Conservation Div. R. 1203. All pleadings before the OCC must be mailed to adverse parties, N.M. Oil Conservation Div. R. 1208, and all testimony delivered before the Commission must be formally recorded, N.M. Oil Conservation Div. R. 1210. Any person testifying under subpoena or in support of or in opposition to a motion before the Commission must do so under oath. *Id.* The OCC's procedural rules further provide:

Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

N.M. Oil Conservation Div. R. 1212. In reaching a decision, the OCC must make written findings of fact that have sufficient support in the record. *Fasken v. Oil Conservation Comm'n*, 532 P.2d 588, 590 (N.M. 1975). Any party adversely affected by an order of the Commission may petition for rehearing, N.M. Stat. Ann. § 70-2-25(A); any party dissatisfied with the disposition of the rehearing may appeal to the state district court, N.M. Stat. Ann. § 70-2-25(B), where the OCC's unitization decision is reviewed for substantial evidence, *Viking Petroleum v. Oil Conservation Comm'n*, 672 P.2d 280, 282 (N.M. 1983). Although New Mexico courts will accord "[s]pecial weight . . . to the experience, technical competence and specialized knowledge of the Commission[.]" *id.*, the OCC's findings must be based on ultimate facts involving "foundational matters," and "basic conclusions of

fact[.]” *Continental Oil v. Oil Conservation Comm’n*, 373 P.2d 809, 814-15 (N.M. 1962).¹¹

Applying *Long* and the criteria enunciated in *Restatement (Second) Judgments* § 83, we are satisfied that the OCC’s approval process is entitled to preclusive effect. As parties interested in the OCC’s proceedings, the Heimanns received notice of the proposed adjudication, *see id.* § 83(2)(a), and, at least during the rehearing, were represented by counsel, *see Long*, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimanns’s enjoyed the opportunity to cross-examine Amoco’s witnesses and present evidence and legal argument of their own. *See id.*; *Restatement (Second) Judgments* § 83(2)(b). The OCC’s order approving the Bravo Dome

¹¹ *Continental Oil* contains language which, when viewed in isolation, suggests that the OCC is not acting in a judicial capacity for preclusion purposes when it approves a proposed unitization plan. 373 P.2d at 818. However, closer analysis of the holding belies such an interpretation. *Continental Oil* held: 1) that the OCC is statutorily required to engage in administrative factfinding on the question of waste and correlative rights; 2) that OCC decisions must be based on those “foundational” matters; and, 3) that separation of powers precludes courts from intruding upon the OCC’s factfinding prerogatives. Whether the procedures followed by the OCC afford a sufficient degree of due process to be accorded preclusive effect in subsequent proceedings was a question that *Continental Oil* did not address. Accordingly, notwithstanding the semantic affinity of *Continental Oil* to the instant inquiry, the Heimanns’ reliance upon *Continental Oil* for the proposition that OCC determinations are not entitled to preclusive effect is misplaced. *Cf. Rio Rancho Estates*, 624 P.2d at 504 (findings of New Mexico State Engineer have preclusive effect in subsequent proceedings).

unit formulated the issues of law and fact in terms of their specific application to the Heimanns correlative rights, *see id.* § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, *see id.* § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo Dome unit; its decision is therefore entitled to preclusive effect. *See City of Socorro*, 173 P. at 684-85.

IV.

Having concluded that the OCC's approval of the Bravo Dome unit is entitled to full faith and credit, we must now determine whether the Heimanns are collaterally estopped from challenging the fairness of the participation formula adopted as part of the unitization plan. Federal courts must apply the law of the state rendering the judgment to determine its collateral estoppel effect; we may not accord greater preclusive effect to a state court judgment than would the state in which the judgment is rendered. *Federal Ins. Co. v. Gates Learject Corp.*, 823 F.2d 383, 385 (10th Cir. 1987); *see C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction* § 4472 (1981).

A.

This court previously has recognized that decisions by state oil conservation agencies may be entitled to collateral estoppel effect. In *Chenoweth v. Pan Am. Petroleum*, 314 F.2d 63, 65 (10th Cir. 1963), a lessor of unitized

mineral interests sought cancellation of an oil and gas lease. Because the participation formula had been decided upon previously by the Oklahoma Corporation Commission, we concluded that the lessor's action constituted an improper collateral attack upon the Commission's authority.

The Oklahoma Corporation Commission has unitized the Oil Creek in this area and [plaintiffs] participate in this production under the established formula. Appellant . . . objects to this unitization order and has an appeal pending on this matter in the Supreme Court of Oklahoma. He attempts to litigate the validity of this order on this appeal, but this cannot be done under these circumstances. To do so would clearly be a collateral attack on the order of the Commission.

Id. Other circuits have also recognized that unitization orders by state oil conservation agencies must remain inviolate to collateral attack. *See, e.g., Katter*, 765 F.2d at 734 (Arkansas law); *Trahan v. Superior Oil*, 700 F.2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); *Mize v. Exxon*, 640 F.2d 637, 640 (5th Cir. 1981) (Alabama law). But where a subsequent action does not directly or indirectly challenge a previous order by a state oil conservation commission, collateral estoppel and res judicata do not attach. *See, e.g., Greyhound Leasing & Financial Corp. v. Joiner City Unit*, 444 F.2d 439, 445 (10th Cir. 1971) (lessor's action against unit operator for damages caused by secondary recovery methods did not constitute collateral attack to any order of the Oklahoma Corporation Commission); *Richardson v. Phillips Petroleum*, 791 F.2d 641, 646 (8th Cir.

1986) (because denial of money damages was not necessarily encompassed in Arkansas Oil and Gas Commission's denial of injunctive relief halting secondary recovery operations, Commission's decision did not bar subsequent action for money damages).

B.

New Mexico traditionally requires four elements for the invocation of collateral estoppel: 1) the parties are the same or are privies of the original parties; 2) the cause of action is different; 3) the issue or fact was actually litigated; and 4) the issue was necessarily determined. *International Paper Co. v. Farrar*. 700 P.2d 642, 644-45 (N.M. 1985). We address these criteria in turn.

Same Parties: The Heimanns were included among the designated parties who sought and obtained rehearing of the OCC's approval of the Bravo Dome unit. They were also among the persons seeking reversal of the OCC's order in the state district court and the New Mexico Supreme Court.

Different Cause of Action: The administrative proceedings before the OCC and judicial proceedings before the New Mexico courts concerning the approval of the Bravo Dome unit constituted a separate and distinct cause of action from the present action in federal court alleging bad faith on behalf of Amoco.

Issue Actually Litigated: New Mexico employs two criteria for determining whether a proposed unitization may be approved by the OCC: 1) prevention of waste and, 2) protection of correlative rights. N.M. Stat. Ann.

§ 70-2-11. New Mexico defines correlative rights as follows:

"correlative rights" means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a pool to produce without waste his *just and equitable share* of the oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially *in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and*, for such purposes, to use his just and equitable share of the reservoir energy.

N.M. Stat. Ann. § 70-2-33(H) (emphasis supplied). Taking the plain meaning of the relevant statute, inherent among the OCC's criteria for approving a unitization plan is the fairness of the participation formula. *See id.*; accord N.M. Stat. Ann. § 70-7-6 (B). In this case, the Heimanns argue that the per-acre allocation of CO₂ revenues under the participation agreement did not fairly represent the quantity of recoverable CO₂ under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such rights, we must conclude that the fairness of the Bravo Dome Unit participation plan was "actually litigated" before the OCC. *See Chenoweth*, 314 F.2d at 65; *Katter*, 765 F.2d at 734.

Issue Necessarily Determined: Although New Mexico accords preclusive effect to the adjudications of administrative agencies in subsequent judicial proceedings, in order to have such effect, the administrative findings must have addressed questions which were essential to the agency's decision. See *Rio Rancho Estates*. 624 P.2d at 504. As stated above, in order to approve a unitization plan, the OCC *must* find that the participation formula protects the correlative rights of all pertinent parties. See N.M. Stat. Ann. § 70-2-11. And in order to determine that the Bravo Dome unitization protected the Heimanns' correlative rights, it was essential that the OCC rule upon the fairness of the unit's participation formula.¹²

"[C]ollateral estoppel not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also

¹² The Heimanns cite this court's recent opinion of *Leck v. Continental Oil Co.*, 892 F.2d 68 (10th Cir. 1989), for the proposition that collateral estoppel should not attach to the findings of the OCC. In *Leck*, we certified to the Oklahoma Supreme Court several questions concerning the jurisdiction of the Oklahoma Corporation Commission vis a vis the state courts. *Id.* at 68. Applying Oklahoma law, the Supreme Court held that the district court, not the Corporation Commission, had *jurisdiction* over a lessor's claim against the unit operator for breach of contract and violation of the operator's fiduciary duty to protect lessor's correlative rights. *Leck v. Continental Oil Co.*, ___ P.2d ___, No. 72,054, slip op. at 8, 10 (Okla. Nov. 28, 1989). The Oklahoma court limited its holding to the jurisdictional question and explicitly declined to address the *res judicata* or collateral estoppel effect of the prior adjudication before the Commission. *Id.* at 8. Accordingly, to the extent that the Heimanns rely upon *Leck* to argue that collateral estoppel should not attach to the findings of the OCC, their reliance is misplaced.

promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review, undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns' correlative rights would be accorded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

The district court shall vacate the judgment in favor of the Heimanns and enter judgment in favor of Amoco consistent with this opinion.¹³

REVERSED and REMANDED.

¹³ Because we reverse the judgment of the district court, we need not consider the additional issues raised by Amoco on appeal or address the Heimanns' cross-appeal.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMOCO PRODUCTION)	
COMPANY,)	
Plaintiff-Counter-defendant-	)	Nos.
Appellant, Cross-Appellee,	)	88-2070
	)	88-2072
v.	)	88-2055
	)	88-2355
J. CASPER HEIMANN; OWAISSA)	
HEIMANN, his wife; ROBERTA)	
NELSON; BOBBY D. ADEE;)	
HOWARD W. ROBERTSON;)	
PAULINE ROBERTSON, his wife;)	
JOHNANN ADEE, as Trustee for)	
SHARON ADEE; DOWLEN)	
ADEE; J. CASPER HEIMANN, as)	
Trustee for; RANDALL LYNNE)	
HEIMANN; JAY DEE HEIMANN;)	
GENE ALVIN HEIMANN;)	
RUSSELL GARY HEIMANN;)	
PAULINE ROBERTSON, as)	
Trustee for; VAN HOWARD)	
ROBERTSON; DEANA SHUGART,)	
a married woman dealing in her)	
sole and separate estate;)	
JOHNANN ADEE, in her capacity)	
as Personal Representative of the)	
Estate of Fred P. Heimann, deceased,)	
Defendants-Counter-claimants-)	
Appellees, Cross-Appellants.)	
ROCKY MOUNTAIN OIL AND)	
GAS ASSOCIATION; NEW)	
MEXICO OIL & GAS)	
ASSOCIATION)	
Amici Curiae.)	

ORDER
Filed May 24, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, Circuit Judges, and THEIS, District Judge.*

On consideration of defendants' petition for rehearing and the response to it, we simultaneously with this order file an amended opinion. In all other respects the petition for rehearing is denied.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher

Patrick Fisher

Chief Deputy Clerk

* Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMOCO PRODUCTION)	
COMPANY,)	
	)	Nos.
Plaintiff-Counter-defendant-	)	88-2070
Appellant, Cross-Appellee,	)	88-2072
vs.	)	88-2055
	)	88-2355
J. CASPER HEIMANN; OWAISSA)	
HEIMANN, his wife; ROBERTA)	
NELSON; BOBBY D. ADEE;)	
HOWARD W. ROBERTSON;)	
PAULINE ROBERTSON, his wife;)	
JOHNANN ADEE, as Trustee for;)	
SHARON ADEE; DOWLEN)	
ADEE; J. CASPER HEIMANN, as)	
Trustee for; RANDALL LYNNE)	
HEIMANN; JAY DEE HEIMANN,)	
GENE ALVIN HEIMANN;)	
RUSSELL GARY HEIMANN;)	
PAULINE ROBERTSON, as)	
Trustee for; VAN HOWARD)	
ROBERTSON; DEANA SHUGART,)	
a married woman dealing in her)	
sole and separate estate;)	
JOHNANN ADEE, in her capacity)	
as Personal Representative of the)	
Estate of Fred P. Heimann, deceased,)	
)	
Defendants-Counter-claimants-)	
Appellees, Cross-Appellants.)	
)	
ROCKY MOUNTAIN OIL AND)	
GAS ASSOCIATION; NEW)	
MEXICO OIL & GAS)	
ASSOCIATION)	
)	
Amici Curiae.)	

ORDER

Filed June 12, 1990

Before SEYMOUR and BALDOCK, Circuit Judges, and
THEIS*, District Judge.

The court has for consideration in the captioned cases:

1. Appellees' second petition for rehearing;
2. Appellees' motion to stay the mandate, together with appellant's response and appellees' reply; and
3. Appellant's motion to include instructions concerning interest in the mandate, together with appellees' response.

Upon consideration whereof, the court denies appellees' second petition for rehearing.

The court also denies appellees' motion to stay the mandate, and directs the clerk to issue the mandate forthwith.

Finally, the court denies appellant's motion to include instructions concerning interest in the mandate. This denial is without prejudice to the appellant's right to bring the issue of interest before the district court when that court enters judgment in favor of the appellant,

* Honorable Frank G. Theis, Senior United District Judge for the District of Kansas, sitting by designation.

Amoco Production Company, pursuant to this court's
mandate.

Entered for the Court

/s/ Robert L. Hoecker

ROBERT L. HOECKER, Clerk

No. 90-479

Supreme Court, U.S.

FILED

OCT 15 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1990

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife;
ROBERTA NELSON; BOBBY D. ADEE and JOHNANN
ADEE, his wife; HOWARD W. ROBERTSON and
PAULINE ROBERTSON, his wife; JOHNANN ADEE, as
Trustee for SHARON ADEE and DOWLEN ADEE;
J. CASPER HEIMANN, as Trustee for RANDALL
LYNN HEIMANN, deceased, JAY DEE HEIMANN,
GENE ALVIN HEIMANN and RUSSELL GARY
HEIMANN; PAULINE ROBERTSON, as Trustee for
VAN HOWARD ROBERTSON; DEANA SHUGART, a
married woman dealing in her sole and separate
estate; and JOHNANN ADEE, in her capacity as
Personal Representative of THE ESTATE
OF FRED P. HEIMANN, deceased,

Petitioners,

v.

AMOCO PRODUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

STEVEN L. TUCKER
P.O. Box 2228
Santa Fe, New Mexico
87504-2228
(505) 982-0011
Counsel for Petitioners
October 15, 1990

JERRY WERTHEIM
215 Lincoln Ave.
P.O. Box 2228
Santa Fe, New Mexico
87504-2228
(505) 982-0011
Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES.....	ii
INTRODUCTION.....	1
POINT I	
THE TIMELY FILING OF A PETITION FOR REHEARING TOLLS THE TIME FOR FILING THE PETITION FOR WRIT OF CERTIORARI UNTIL THE PETITION IS DENIED.....	1
POINT II	
A PETITION FOR REHEARING WHICH SEEKS A SUBSTANTIVE CHANGE IN THE OPINION TOLLS THE TIME FOR FILING REGARDLESS OF WHETHER THE COURT MAKES ANY SUCH CHANGE	3
POINT III	
THE COURT OF APPEALS HAD THE AUTHORITY TO ENTERTAIN THE SECOND PETITION FOR REHEARING.....	6
POINT IV	
THE SECOND PETITION COULD NOT HAVE BEEN FILED EARLIER AND, ALTER- NATIVELY, EVEN AN UNTIMELY PETITION FOR REHEARING TOLLS THE FILING TIME WHERE THE LOWER COURT ACCEPTS IT FOR FILING, CONSIDERS IT, AND DENIES IT	7
CONCLUSION	10
APPENDIX I Petition for Rehearing and Sugges- tion for Rehearing En Banc, filed on April 20, 1990.....	1a
APPENDIX II Petition for Rehearing filed on June 7, 1990.....	17a

TABLE OF CASES AND AUTHORITIES

	Page
CASES	
<i>Bowman v. Loperna</i> , 311 U.S. 262 (1940).....	8, 9
<i>Continental Oil Co. v. Oil Conservation Commission</i> , 70 N.M. 310, 373 P.2d 809 (1962).....	5
<i>Cahill v. New York, N.H. & H.R. Co.</i> , 351 U.S. 183 (1956)	7
<i>Clarke v. United States</i> , 898 F.2d 162 (D.C.Cir. 1990) ...	6, 7
<i>Department of Banking of Nebraska v. Pink</i> , 317 U.S. 264 (1942)	1, 4
<i>Federal Communications Commission v. League of Women Voters of California</i> , 468 U.S. 364 (1984)	4
<i>Federal Power Commission v. Idaho Power Co.</i> , 344 U.S. 17 (1952)	3
<i>Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.</i> , 344 U.S. 206 (1952)	3
<i>Gondeck v. Pan American World Airways, Inc.</i> , 382 U.S. 25 (1965)	7
<i>Mayo v. Lynaugh</i> , 893 F.2d 683 (5th Cir. 1990).....	7
<i>Missouri v. Jenkins</i> , ___ U.S. ___, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990).....	1, 4, 9
<i>National Latex Products Co. v. Sun Rubber Co.</i> , 276 F.2d 167 (6th Cir. 1960).....	6, 7
<i>Pfister v. Northern Illinois Finance Corp.</i> , 317 U.S. 144 (1942)	9
<i>United States v. Adams</i> , 383 U.S. 39 (1966)	3

TABLE OF CASES AND AUTHORITIES – Continued

	Page
<i>United States v. Crescent Amusement Co.</i> , 323 U.S. 173 (1944)	4
<i>United States v. Ohio Power Co.</i> , 353 U.S. 98 (1957)	7
<i>Washington v. Confederated Tribes of Colville</i> , 447 U.S. 146 (1980)	6

AUTHORITIES

New Mexico Statutory Unitization Act, §§ 70-7-1, et seq., NMSA 1978	5
R. Stern, E. Gressman & S. Shapiro, <i>Supreme Court Practice</i> (6th ed. 1986)	1, 3, 9
S.Ct.R. 13.4	1, 5



INTRODUCTION

This Reply Brief addresses only the issue of the timeliness of the Petition for Writ of Certiorari, which is an issue raised for the first time in the Brief of Respondent in Opposition.

POINT I

THE TIMELY FILING OF A PETITION FOR REHEARING TOLLS THE TIME FOR FILING THE PETITION FOR WRIT OF CERTIORARI UNTIL THE PETITION IS DENIED.

The dispositive point is one which is not questioned: The timely filing of a petition for rehearing tolls the time for filing the petition for writ of certiorari until the petition is denied. This has been the consistent practice of this Court for nearly fifty years. *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). Since 1980, it has been reflected in this Court's rules. S.Ct.R. 13.4. See generally, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, § 6.3, p. 313 (6th ed. 1986). The reason for the rule is that a timely petition for rehearing,

operates to suspend the finality of the court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.

Missouri v. Jenkins, *supra*, 110 S.Ct. at 1660 (quoting *Department of Banking of Nebraska v. Pink*, 317 U.S. 264, 266 (1942)).

The operative dates and events are as follows:

- April 6, 1990 Tenth Circuit issued its original Opinion (attached to the Brief of Respondent as Appendix A).
- April 20, 1990 Petitioners timely filed their "Petition for Rehearing and Suggestion for Rehearing En Banc" (attached to this Reply Brief as Appendix I).
- May 24, 1990 Tenth Circuit filed an amended Opinion and an Order reflecting that "[i]n all other respects, the petition for rehearing is denied" (attached to the Petition for Writ of Certiorari as Appendices A and G, respectively).
- June 7, 1990 Petitioners filed a "Petition for Rehearing" from the amended Opinion entered on May 24, 1990 (attached hereto as Appendix II).
- June 12, 1990 Tenth Circuit entered its Order denying Petitioners' "second petition for rehearing" (attached to the Petition as Appendix H).
- Sept. 10, 1990 Petitioners filed their Petition for Writ of Certiorari with this Court.

The finality of the Court's original Opinion was suspended by the timely filing of Petitioner's first Petition for Rehearing on April 20, 1990. When the Tenth Circuit entered its amended Opinion on May 24, 1990, that amended Opinion necessarily superseded and replaced the original Opinion and became the operative Opinion. Petitioners filed a timely Petition for Rehearing from that amended Opinion on June 7, 1990, so the finality of that amended Opinion was thereby suspended. That Petition was denied on June 12, 1990. Petitioners then filed their

Petition for Writ of Certiorari with this Court on September 10, 1990, ninety days later. Therefore, the Petition is timely.

Respondent does not question the operative dates or events. However, it argues that this analysis does not apply for these reasons: (1) the time is not tolled unless the amended Opinion or judgment reflects a substantive change rather than a formal correction, (2) a second petition for rehearing is not authorized and can therefore be ignored, and (3) the second Petition was untimely since the prospectivity issue could have been raised in the first Petition. None of these arguments has any merit.

POINT II

A PETITION FOR REHEARING WHICH SEEKS A SUBSTANTIVE CHANGE IN THE OPINION TOLLS THE TIME FOR FILING REGARDLESS OF WHETHER THE COURT MAKES ANY SUCH CHANGE.

First, Respondent argues that the time for filing a petition for writ of certiorari is measured from the original judgment unless the amended judgment changes matters of substance or resolves an ambiguity in the original judgment, but not if it merely restates what it had already decided, citing *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952). However, neither of those cases involved the effect of a petition for rehearing on the finality of the judgment. In neither case was a petition for rehearing filed. See, *United States v. Adams*, 383 U.S. 39, 41-42 (1966) (applying the tolling rule and distinguishing *Minneapolis-Honeywell* because "it did not involve a timely motion to amend the judgment"). See also, *Supreme Court Practice*, *supra*, at

§ 6.4, pp. 314-315. Because this case involves the effect of a petition for rehearing on the time limitation for filing a petition for writ of certiorari, those cases are inapplicable.

Just this year, this Court made it clear that the tolling rule *does* apply in circumstances such as this one.

The [tolling] practice does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court. In such cases, of which *Pink* was one, "no . . . alteration of the rights [is] asked, and the finality of the court's first order [is] never suspended." [Citing *Pink*, *supra*].

Missouri v. Jenkins, *supra*, 110 S.Ct. at 1660, n. 13.

The application of this exception depends, however, not on how the Court of Appeals ruled on the petition, but on what the petition asked the Court to do. *Id.*; *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364, 373, n. 10 (1984); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944). If the petition asks for only a formal correction not affecting the rights of the parties, then the finality is not suspended. Accordingly, the party knows at the time the petition for rehearing is filed whether his time for filing the petition for certiorari is tolled, depending on the relief sought in his petition for rehearing.

If, as Respondent seems to suggest, the tolling depended on whether the Court actually made any substantive changes in the opinion, then two results would obtain: (1) the party would not know whether his time was tolled until the court ruled on his petition for rehearing, which ruling could take more than 90 days, and (2) in the vast majority of cases, there would be no tolling since

courts of appeals rarely make substantive changes as a result of petitions for rehearing but, rather, simply deny them. Both of these results conflict squarely with the purpose and language of S.Ct.R. 13.4, which is to allow tolling for a petition for rehearing until "the date of the denial of the petition for rehearing or the entry of the subsequent judgment." Therefore, as long as the petition for rehearing *seeks* substantive changes in the opinion, then it is a petition for rehearing in form and substance, and S.Ct.R. 13.4 applies to toll the time for filing the petition for writ of certiorari.

In this case, both the first and the second Petitions for Rehearing are attached to this Reply Brief. They demonstrate, and the Respondent does not deny, that in both Petitions, Petitioners sought substantive changes in the Opinions. The first one (Appendix I to this Reply Brief) was aimed at numerous defects in the analysis which led the Court to its conclusions, and sought to alter the Court's Opinion on the issues presented. In response to that Petition, the Court made substantive alterations in its analysis by reducing its reliance upon the New Mexico Statutory Unitization Act, §§ 70-7-1, et seq., NMSA 1978, and attempting to distinguish the case of *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962), but its conclusion was unaltered. (Appendix A to the Petition).

After the Court had refined and finally arrived at its decision on the merits, in which it overruled one of its prior decisions, in the second Petition for Rehearing, Petitioners sought to have the Court's amended Opinion applied prospectively. (Appendix II to this Reply Brief). That Petition was simply denied. (Appendix H to the

Petition). However, it is absolutely clear that both Petitions sought major, substantive changes and the affirmation of the judgment of the District Court. Neither of them sought only "formal" changes unrelated to the rights of the parties.

Moreover, the second Petition for Rehearing rendered non-final all the issues in the case, not merely the issue of prospectivity. See, *Washington v. Confederated Tribes of Colville*, 447 U.S. 146 (1980) (in an appeal from the decision of a three-judge court, the post-trial motion for partial new trial rendered non-final and reviewable all issues, not merely those which were the subject of the motion). See also, *Clarke v. United States*, 898 F.2d 162 (D.C.Cir. 1990) (applying the same rule in connection with certiorari).

Therefore, both of these Petitions for Rehearing have the effect of tolling the time for filing the Petition for Writ of Certiorari.

POINT III

THE COURT OF APPEALS HAD THE AUTHORITY TO ENTERTAIN THE SECOND PETITION FOR REHEARING.

Secondly, Respondent argues that the second Petition should be disregarded because a second or successive petition for rehearing is not authorized, citing *National Latex Products Co. v. Sun Rubber Co.*, 276 F.2d 167 (6th Cir. 1960). In that case, the petitioner filed a second Petition for Rehearing which raised the same issues contained in the first Petition. In the case at bar, the second Petition (1) was filed after the Court amended its Opinion, (2) was

directed at the amended Opinion, and (3) was not repetitive of the first Petition. Therefore, *National Latex* is distinguishable.

Moreover, a second petition for rehearing is authorized. This Court has not only entertained second petitions for rehearing but has granted them. *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *United States v. Ohio Power Co.*, 353 U.S. 98 (1957); *Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183 (1956). Likewise, the practice of the federal courts of appeals is to hear second petitions for rehearing, and they have granted them as well. See e.g., *Clarke v. United States*, *supra*; *Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1990). Indeed, in *Clarke*, the Court held that the motion to vacate the order denying the first petition for rehearing (which motion was treated as a second petition for rehearing) effectively tolled the time for filing a petition for certiorari in this Court.

Therefore, Petitioners' second Petition for Rehearing, which was timely filed within fourteen days of the amended Opinion of May 24, 1990, had the effect of suspending the finality of that amended Opinion until June 12, 1990, when that Petition was denied.

POINT IV

THE SECOND PETITION COULD NOT HAVE BEEN FILED EARLIER AND, ALTERNATIVELY, EVEN AN UNTIMELY PETITION FOR REHEARING TOLLS THE FILING TIME WHERE THE LOWER COURT ACCEPTS IT FOR FILING, CONSIDERS IT, AND DENIES IT.

Finally, the second Petition for Rehearing cannot be ignored on the ground that the petitioner's position on

prospectivity could have been raised in the first Petition for Rehearing. It could not have been raised in the first Petition for Rehearing because the analysis and Opinion of the court on the merits were not final until May 24, 1990, when it issued its amended Opinion. Only then could the issue of prospectivity of that amended Opinion be raised and addressed. Whether a different case might be presented where successive petitions for rehearing are directed at the same opinion is an issue not presented by these facts and need not be decided here.

Moreover, Respondent cites no authority for the proposition that a second petition for rehearing which raises an issue that could have been raised in the first petition for rehearing but was not raised therein is void. However, even assuming *arguendo* that the issue of prospectivity could have been raised in the first Petition, that would make the second Petition for Rehearing at best merely untimely, not void. The rule on untimely petitions for rehearing was stated in *Bowman v. Loperna*, 311 U.S. 262 (1940), as follows:

[T]he filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court *allows the filing and, after considering the merits, denies the petition*, and the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

Id. at 266. (Emphasis added).

See also, Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942). *See generally, Supreme Court Practice, supra*, at § 6.3, p. 313.

Here, the Tenth Circuit's Order of June 12, 1990 (Appendix H to the Petition) provided, in part, as follows:

The court has for consideration in the captioned cases:

1. Appellees' second petition for rehearing;

. . . .

Upon consideration whereof, the court denies appellees' second petition for rehearing.

If the Tenth Circuit had felt that the second Petition for Rehearing was untimely filed, it would not have had that Petition before it "for consideration." By considering it and denying it "upon consideration whereof," the Court brought the second Petition within the rule of *Bowman v. Loperina, supra*. As in *Missouri v. Jenkins, supra*, the treatment afforded the petition for rehearing by the lower court should be given deference in applying the rules on the time for filing the petition for certiorari.

Accordingly, even assuming *arguendo* that the second Petition was untimely, it was nevertheless accepted for filing, considered, and denied and, therefore, had the effect of tolling the time for filing the Petition for Certiorari.



CONCLUSION

Accordingly, the Petition for Writ of Certiorari should not be dismissed as untimely. For the reasons stated therein, it should be granted.

Respectfully submitted,

JERRY WERTHEIM
215 Lincoln Ave.
Post Office Box 2228
Santa Fe, New Mexico 87504-2228
(505) 982-0011
*Counsel of Record
for Petitioners*

APPENDIX I
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 88-2070, 88-2072,
88-2255, 88-2355 (Consolidated)

AMOCO PRODUCTION COMPANY,
Plaintiff-Appellant and Cross-Appellee,
vs.

J. CASPER HEIMANN and OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE and JOHN-ANN ADEE, his wife; HOWARD W. ROBERTSON and PAULINE ROBERTSON, his wife; JOHNNANN ADEE, as Trustee for Sharon Adee and Dowlen Adee; J. CASPER HEIMANN, as Trustee for Randall Lynn Heimann, deceased; Jay Dee Heimann, Gene Alvin Heimann and Russell Gary Heimann, PAULINE ROBERTSON, as Trustee for Van Howard Robertson; DEANA SHUGART, a married woman, dealing in her sole and separate estate; JOHNNANN ADEE, as Personal Representative of the ESTATE OF FRED P. HEIMANN, Deceased,

Defendants-Appellees and Cross-Appellants.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Filed April 20, 1990)

JERRY WERTHEIM
STEVEN L. TUCKER
ARTURO L. JARAMILLO
Jones, Snead, Wertheim,
Rodriguez & Wentworth, P.A.
Post Office Box 2228
Santa Fe, New Mexico 87504-2228
(505) 982-0011
Attorneys for Appellees

Pursuant to Rules 35 & 40, Fed.R.App.P., and 10th Cir. Rules 35 & 40, all of the above-named Defendant-Appellees and Cross-Appellants (hereinafter "the Heimanns") hereby petition for rehearing and suggest that the rehearing be en banc.

CERTIFICATION PURSUANT TO 10TH CIR. R. 35.2.2

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the United States Supreme Court and United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Amoco Production Co. v. Jacobs, 746 F.2d 1394 (10th Cir. 1984);

Oklahoma Packing Co. v. Oklahoma Gas & Electric, Co., 309 U.S. 4 (1940);

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908)

Granfinanciera, S.A., v. Nordberg, ___ U.S. ___, 109 S.Ct. 2782 (1989);

Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442, 458 (1977).

I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

Where a federal jury awarded damages for breach of an implied covenant under a lease, did the panel decision deprive the litigants of their right to a jury trial under the Seventh Amendment to the United States Constitution by vacating the jury award and giving collateral estoppel effect to findings made by a state

agency which, under state law, acts only in an administrative, not a judicial, capacity?

/s/ Steven L. Tucker
STEVEN L. TUCKER
Attorney of Record for the
Heimanns

Background

Plaintiff-Appellant and Cross-Appellee (hereinafter "Amoco") brought this action seeking a declaratory judgment to the effect that the Heimanns' mineral lands were legally included in a carbon dioxide gas unit in northeastern New Mexico, known as the Bravo Dome Carbon Dioxide Gas Unit. The Heimanns own lands on which Amoco has mineral leases and, under the terms of those leases, Amoco has the right to unitize those lands with other lands, subject to the express and implied obligations under the leases. The Heimanns counterclaimed against Amoco alleging, among other things, that Amoco had breached its implied obligation of good faith under the leases and seeking monetary [sic] damages caused by the breaches and injunctive relief requiring Amoco to exclude the Heimanns' lands from the unit.

The Heimanns demanded a jury trial on all issues triable to a jury. A jury trial was held and the jury returned a verdict in favor of the Heimanns on the good faith issue awarding compensatory damages of \$3,500,000 and punitive damages of \$500,000. After that verdict had been returned, the trial court independently considered the equitable issues and entered detailed findings of fact and conclusions of law in which it also found that Amoco had breached its duty of good faith to the Heimanns.

Appropriate judgments were entered awarding damages and ordering that the Heimanns lands be taken out of the Bravo Dome unit.

Prior to trial Amoco had argued that the issue of its good faith was conclusively established in its favor by certain findings made by the New Mexico Oil Conservation Commission ("OCC") in an administrative proceeding held in 1980. On the basis of this Court's decision in *Jacobs*, the trial court rejected that contention and held that the OCC did not and could not decide any issues as between Amoco and the Heimanns.

On appeal, the panel of this Court overruled *Jacobs*, held that the OCC's findings were conclusive as between Amoco and the Heimanns on the issue of whether Amoco breached its duty of good faith to the Heimanns under their leases, and vacated the judgment entered on the jury verdict as well as the judgment entered by the court on the equitable issues.

POINT I

THE PANEL DECISION CONFLICTS WITH THE OKLAHOMA PACKING AND PRENTIS DECISIONS BY FAILING TO APPLY NEW MEXICO LAW ON THE ISSUE OF THE OCC'S ADMINISTRATIVE CAPACITY.

The panel decision correctly holds that in order for collateral estoppel to apply to a decision of an administrative agency, the agency must, among other things, be acting in a "judicial capacity." See, *University of Tennessee v. Elliott*, 478 U.S. 788, 797-799 (1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). The full statement of the rule, stated in *Elliott*, is as follows:

[W]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *Utah Construction & Mining Co., supra*, 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

Elliott, supra, at 799.

Thus, there are at least two requirements for the application of collateral estoppel to decisions of administrative agencies: (1) the agency must be acting in a "judicial capacity" and (2) the parties must have had an "adequate opportunity to litigate" the issues adjudicated by the agency.

The New Mexico Supreme Court has definitively ruled that the OCC acts only in a legislative or "administrative" capacity when it acts to prevent waste and to protect correlative rights, not in a "judicial" capacity. Therefore, collateral estoppel cannot apply to the rulings of the OCC. However, the panel failed to apply New Mexico law on this issue.

In *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962), the Supreme Court conducted an extensive review of the statutes applicable to the jurisdiction of the OCC and its powers and duties in preventing waste and protecting correlative rights. In that case, the OCC had prorated a gas pool and had established a formula for allocating production from that pool. Later, upon application of one of the producers, the OCC held a hearing and then changed the formula. Other producers sought a rehearing and, after a rehearing, the

OCC entered a slightly modified order. The statute at that time allowed for a de novo appeal to the district court, and several producers appealed.

On appeal, the district court (1) prohibited the OCC from participating as a party and (2) allowed new evidence to be introduced on the issues. The Supreme Court said that "the function of the commission, i.e., whether administrative or quasi-judicial, is all-important" to both of those issues. *Id.*, 373 P.2d at 817. It held as follows:

Our legislature has explicitly defined both "waste" and "correlative rights" and placed upon the commission the duty of preventing one and protecting the other. . . . Although subservient to the prevention of waste and perhaps to the practicalities of the situation, the protection of correlative rights must depend upon the commission's findings as to the extent and limitations of the right. This the commission is required to do under the legislative mandate. *As such, it is acting in an administrative capacity in following legislative directions, and not in a judicial or quasi-judicial capacity.*

Id., 373 P.2d at 818 (Emphasis added).

The Court went on to state that the OCC represents only the "public interest" when it prevents waste and protects correlative rights. That is, its legislative mandate is to prevent waste of New Mexico's natural resources and, when it acts within its jurisdiction to do so, such as in prorating allowable production, it must insure that the correlative rights of interest owners are kept in balance. However, the Court made clear that the OCC acts solely to protect the public interest; it does not adjudicate anything. If it did so,

grave constitutional problems would arise. For the same reason, it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one.

Id., 373 P.2d at 819. Accordingly, the Court held the OCC to be a necessary party to an appeal from its own order and the provision allowing for de novo appeals of that order to the district court to be contrary to the separation of powers provision of the New Mexico Constitution. *Id.*

Some 13 years later, the Supreme Court characterized the *Continental Oil* decision as "the primary oil and gas decision in New Mexico." *Grace v. Oil Conservation Commission*, 87 N.M. 205, 531 P.2d 939, 946 (1975). Yet, the panel simply overlooked it and failed to apply its clear and unequivocal holding that the OCC acts in a legislative or administrative capacity in preventing waste and protecting correlative rights, not in a judicial capacity.

The panel decision thus conflicts with *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940). In that case, the issue was whether a 1930 decision by the Oklahoma Supreme Court was res judicata. That decision had been entered on an appeal from the Oklahoma Corporation Commission in a rate proceeding. The Supreme Court of the United States held that (1) state law determined whether the decision was legislative (administrative) or judicial (2) another decision of the Oklahoma Supreme Court had determined that both administrative proceedings and appellate proceedings in rate cases constituted legislative, not judicial proceedings, and (3) being a legislative proceeding, res judicata did not apply. The panel decision conflicts with *Oklahoma Gas* by failing

to apply the law of New Mexico, specifically the holding in the *Continental Oil* case, on the issue of whether the proceedings before the OCC were legislative or judicial.

The panel decision also conflicts with *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). In that case, the Court held that proceedings are legislative or judicial, not according to the body which conducts them, but based upon the character of the proceedings. Moreover, where the administrative proceedings are legislative in nature, their character does not change upon an appeal through the courts.

So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. . . . And all that we have said would be equally true if an appeal had been taken to the supreme court of appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called.

Id. at 227. (Emphasis added).

Therefore, by holding that the appeals of the OCC decision to the state district court and Supreme Court changes the legislative character of the proceedings, the panel decision conflicts with both *Prentis* and *Oklahoma Gas*.

Finally, the panel decision also failed to apply clear New Mexico law in its analysis of New Mexico statutes

on the jurisdiction of the OCC, and the result was a conclusion which has no support in New Mexico law and is directly contrary to two decisions of the New Mexico Supreme Court.

No statute gives the OCC the power, the authority, or the duty to approve or disapprove a voluntary unitization project such as this. Nevertheless, the Heimanns have never questioned the jurisdiction of the OCC and bring no collateral attack against its order. The point is, assuming that the OCC had jurisdiction to "approve" the Bravo Dome unit, that approval order can represent nothing more than a determination by a state agency of New Mexico's *public interest*; it can represent no adjudication of any issue in this lawsuit and therefore, can have no collateral estoppel effect here.

The panel decision cites three statutes as defining the authority of the OCC to approve this project: §§ 70-2-11, 70-2-33(H), and 70-7-6(B), NMSA 1978. The last of these is quoted on page 15 of the panel decision and is given major emphasis. However, that statute is contained in the Statutory Unitization Act, §§ 70-7-1, et seq., NMSA 1978. On the appeal from the OCC decision at issue here, the New Mexico Supreme Court held, with the agreement of Amoco, that the Statutory Unitization Act does not apply to the Bravo Dome Unit.

New Mexico's Statutory Unitization Act, NMSA 1978, Section 70-7-1 through 70-7-21 (Unitization Act), is an example of forced or compulsory unitization. However, the Unitization Act does not apply to the situation presented in this appeal. It applies to secondary and tertiary recovery projects, not to *voluntary exploratory*

units for primary production such as that proposed in the Bravo Dome Unit. § 70-7-1.

Casados v. Oil Conservation Commission, No. 14,359 (N.M.S.Ct. unpublished) attached to the Brief of the Appellant as Attachment 1, at page 9. (Emphasis by the Court).

The Court went on to hold that in any proceedings for the approval of voluntary unitization projects, such as the Bravo Dome Unit, there is "no conflict" to resolve since the interest of the parties are protected by their leases. *Id.* at 9-10. Leases must, of course, be enforced in a judicial forum.

The second statute cited by the panel is § 70-2-33(H), NMSA 1978, which merely defines "correlative rights." As such, it confers no jurisdiction and creates no duty or authority.

The final statute cited is § 70-2-11, NMSA 1978, a general statute which does nothing more than give the OCC the power and duty to prevent waste and to protect correlative rights. However, the jurisdiction of the OCC to prevent waste and to protect correlative rights was extensively examined in *Continental Oil* and was held not to extend to adjudication of private rights. The panel decision disregards *Continental Oil* and forcibly stretches this statute to include adjudications.

The panel decisions also overlooked § 70-2-29, NMSA 1978, which is a clear expression by the Legislature that nothing done by the OCC under the authority of the Oil and Gas Act, § 70-2-1, et seq., NMSA 1978, is intended to

impair or abridge any person's right to go to court and sue for damages. It provides,

Nothing in this act contained or authorized, and no suit by or against the commission or the division, . . . shall impair or abridge or delay any cause of action for damages which any person may have or assert against any person violating any statute of the state with respect to conservation of oil and gas, or any provision of this act, or any rule, regulation or order issued thereunder. Any person so damaged by the violation may sue for and recover such damages as he may be entitled to receive. . . .

The panel simply reached over clear New Mexico authority on this subject and collected distinguishable authority from other jurisdictions. *University of Tennessee v. Elliott*, *supra*; *Kremer v. Chemical Construction Corp.*, 456 U.S. 485 (1982); and *Long v. Laramie County Community College District*, 840 F.2d 743 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 73 (1988), were all employment discrimination cases where the agency had the statutory duty of adjudicating and validity of the specific employee's discrimination claim based on individual-specific evidence. That kind of administrative action was so obviously "judicial" rather than "legislative" that the point did not even merit discussion. The discussion in those cases about the opportunity of the parties to litigate the issue before the agency applied to the *second* element stated in the *Elliott* test, which is quoted on page 4 of this Petition, not on whether the body acts in a "judicial capacity."

By overlooking clear New Mexico precedent establishing that the OCC was acting in a legislative, not a judicial, capacity, and reaching out to inapplicable

authority, the panel decision conflicts with prior decisions of the Supreme Court of the United States and erroneously applied the doctrine of collateral estoppel to this case.

POINT II

THE PANEL DECISION DEPRIVES THE HEIMANNS OF THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL BY GIVING COLLATERAL ESTOPPEL EFFECT TO A DETERMINATION BY A STATE AGENCY ON AN ISSUE OF PRIVATE RIGHTS

The Heimanns argued in their main brief (p. 39) that to apply collateral estoppel based on the findings of the OCC in this case would deprive them of their right to a jury trial.

The right to a jury trial in federal court under the Seventh Amendment to the United States Constitution is a question of federal law in diversity cases. *Simler v. Conner*, 372 U.S. 221 (1963); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958); *See, Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988).

Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.

Simler v. Conner, *supra* at 222.

The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved.

Just last month, the Supreme Court repeated the standard by which it reviews attempts to limit the Seventh Amendment.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, ___ U.S. ___, 58 U.S.L.W. 4345, 4346 (March 20, 1990), quoting from *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500, 501 (1959).

By application of what it calls the "public rights doctrine," the Supreme Court has consistently held that Congress may not constitutionally relegate a party to an administrative agency to enforce *private rights*.

Our prior cases support administrative fact finding in only those situations involving "public rights," *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases as well are not at all implicated.

Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442, 458 (1977). *See also*, *Hartman v. El Paso Natural Gas Co.*, 107 N.M. 679, 763 P.2d 1144, 1151 (1988) (confirming that in New Mexico, the OCC determines only "public rights" within the meaning of this doctrine; only the courts can determine "private rights.")

[Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized

in *Atlas Roofing*, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forbears. 430 U.S. at 457-458. The Constitution nowhere grants Congress such puissant authority.

Granfinanciera, S.A., v. Nordberg, ___ U.S. ___, 109 S.Ct. 2782, 2795 (1989).

Therefore, just as Congress cannot "eviscerate" the constitutional right to a jury trial by allowing administrative agencies to determine "private rights," neither could the New Mexico Legislature do so even assuming that such had been its intent in the Oil and Gas Act.

There can be no question that the Heimanns' claims for damages for breaches of their leases by Amoco, the lessee, involve only "private rights."

State-law causes of action for breach of contract or warranty are paradigmatic of private rights.

Id. at 2798. See also, *Atlas Roofing*, *supra* at 458 (including "[w]holly private tort, contract and property cases" as involving only "private rights").

This case is far clearer that *Granfinanciera* and *Atlas Roofing* because here neither Congress nor the New Mexico Legislature has created a "statutory cause of action" which could be confused with the Heimanns' right to recover damages for Amoco's breach of its obligations under its leases. Nothing in the Oil and Gas Act gives the Heimanns a "cause of action," of any kind and, indeed,

the legislature referred those claiming damages from any statutory violations to the courts to obtain redress. § 70-2-29. NMSA 1978. Moreover, even if such had been its intent, the legislature could not have transformed the Heimanns' private rights into an administrative claim of some kind.

Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, supra, at 2800.

Legislative attempts to deprive parties of their right to adjudicate private rights in a jury trial will not be recognized, and the Seventh Amendment right will prevail over the legislation. In *Granfinanciera*, the Court held that a party's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a) was a private right and, therefore, the statute authorizing a legislative body to decide that issue could not deprive the party of his Seventh Amendment right to a jury trial. Therefore, just as legislation referring fraudulent conveyance claims to non-juries was held ineffective in *Granfinanciera*, so also any attempt by the New Mexico legislature to refer the Heimanns' contract claims to a non-jury tribunal would be ineffective to deprive them of their right to a jury trial on those claims.

This Court's decision in *Jacobs* rejecting the application of collateral estoppel to the very OCC ruling at issue here was presumably based on these principles, although the basis of its holding was unarticulated. The panel

decision in the case at bar, overruling *Jacobs*, constitutes an erroneous and highly dangerous precedent by permitting a decision by a state agency, acting in a non-judicial capacity, to conclusively determine and thereby preclude a claim over which a party has a right to a jury trial under the Seventh Amendment to the United States Constitution. Accordingly the Heimanns respectfully petition for rehearing and suggest that rehearing be en banc.

Respectfully submitted,
JONES, SNEAD, WERTHEIM,
RODRIGUEZ &
WENTWORTH, P.A.
Attorneys for the Heimanns

By /s/ Steven L. Tucker
JERRY WERTHEIM
STEVEN L. TUCKER
ARTURO L. JARAMILLO
Post Office Box 2228
Sante Fe, New Mexico
87504-2228
(505) 982-0011

APPENDIX II
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 88-2070, 88-2072,
88-2255, 88-2355 (Consolidated)

AMOCO PRODUCTION COMPANY,
Plaintiff-Appellant and Cross-Appellee,
vs.

J. CASPER HEIMANN and OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE and JOHN-ANN ADEE, his wife; HOWARD W. ROBERTSON and PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for Sharon Adee and Dowlen Adee; J. CASPER HEIMANN, as Trustee for Randall Lynn Heimann, deceased; Jay Dee Heimann, Gene Alvin Heimann and Russell Gary Heimann, PAULINE ROBERTSON, as Trustee for Van Howard Robertson; DEANA SHUGART, a married woman, dealing in her sole and separate estate; JOHNANN ADEE, as Personal Representative of the ESTATE OF FRED P. HEIMANN, Deceased,

Defendants-Appellees and Cross-Appellants.

PETITION FOR REHEARING
(Filed June 7, 1990)

The Defendants-Appellees above-named (hereinafter "the Heimanns") hereby petition for rehearing, pursuant to Rule 41, F.R.A.P., and 10th Cir. Rule 40, directed to the amended opinion filed in these consolidated appeals on May 24, 1990.

The sole issue presented in this Petition for Rehearing is whether the Court's opinion, expressly overruling *Amoco Production Co. v. Jacobs*, 746 F.2d 1394 (10th Cir. 1984), should be given retroactive or prospective effect.

INTRODUCTION

Whenever this Court overrules one of its prior decisions, it must also decide whether to give its new opinion retroactive or prospective effect. *Equal Employment Opportunity Commission v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984); *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984). Here, the Court did not expressly address this issue in its amended opinion, although it did implicitly hold that its decision would have retroactive effect and be applied to the parties before the Court. The Heimanns had no prior opportunity to address the retroactivity issue and, therefore, petition for rehearing on this ground.¹

POINT I

APPLYING THE "OPERATIVE CONDUCT" STANDARD, THE COURT SHOULD GIVE PROSPECTIVE EFFECT TO ITS DECISION

In deciding whether to give a new rule of law retroactive or prospective effect, this Court has, in the past,

¹ In the briefs filed on the merits of this appeal, Amoco Production Co. ("Amoco") did not request this Court to overrule the holding in *Jacobs* that the prior determination by the New Mexico Oil Conservation Commission was not binding on the parties in their action brought in federal court. See, Brief of the Appellant, pp. 35-42 and Amoco's Reply Brief, pp. 11-16. Accordingly, the Heimanns had neither the occasion nor the opportunity, prior to the Court's announcement of its decision overruling *Jacobs* on that point, to raise the issue of whether its decision should be given retroactive or prospective effect.

considered the three factors discussed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).² However, the Supreme Court of the United States has recently issued an opinion which frames this issue and the applicable standard in clearer focus. In *American Trucking Association, Inc. v. Smith*, No. 88-325 (June 4, 1990), the plurality of the Court affirmed the application of the three *Chevron* factors, and "distilled" those factors into the following standard:

The principles underlying the Court's civil retroactivity doctrine can be distilled from both criminal and civil cases considering this issue. When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law. See, e.g. *Chevron Oil*, 404 U.S. at 107. In order to protect such reliance interests, the Court first identifies and defines the operative conduct or events that would be affected by the new decision. *Lower courts* considering the applicability of the new decision to pending cases *are then instructed as follows: If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law.*

² Both this Court and the New Mexico Supreme Court have applied the three factors from *Chevron Oil Co. v. Huson*, *supra*, in deciding whether a decision overruling prior case law will be given retroactive effect. *Whenry v. Whenry*, 98 N.M. 737, 652 P.2d 1188 (1982).

Id., slip opinion at 21 (all references to *American Trucking* are to the plurality opinion). (Emphasis added).

The "law-changing decision" in this case is, of course, this Court's amended opinion of May 24, 1990, and, specifically, the following holding from that opinion:

Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. To the extent that *Jacobs* holds to the contrary, it is overruled. [Footnote reciting circulation of the opinion among all active judges of the court omitted].

Amoco Production Co. v. Heimann, amended opinion, pp. 16-17.

The first step in applying this standard is to identify and define the "operative conduct or events that would be affected by the new decision." Here, the "operative conduct or events" consist of (1) a mineral lease containing a "unitization clause" such as that in this case, the *Jacobs* case or *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 933 (10th Cir. 1954), (2) the lessee's application to a properly-empowered agency such as the New Mexico Oil Conservation Commission for approval of a proposed unit combining a lessor's lands with other lands, (3) the agency's approval of that application based on a determination that the unitization adequately protects correlative rights, (4) a subsequent claim raised by a lessor in a judicial proceeding that the proposed unit constitutes or is the result of a breach of the lessee's duty of good faith

to the lessor, and (5) the lessee's inclusion of the lessor's lands within the unit based on its position that the agency approval resolved any issue of its good faith to the lessor. That conduct and those events, particularly the litigation, would necessarily be "affected" by this Court's decision on collateral estoppel.

Finally, if the operative conduct or events occurred *before* the law-changing decision, as here, "a court should apply the law prevailing at the time of the conduct." *American Trucking, supra*, slip opinion at 21. Here, all of the operative conduct or events occurred before the law-changing decision. Therefore, under this standard, the law to be applied is the law in effect before the law-changing decision which, in this case, is the law as announced by this Court in *Jacobs*.

Accordingly, applying the "operative conduct" standard, this Court's amended opinion should be given prospective effect.

This result comports with both the letter and spirit of *American Trucking*. Distilled to its essence, the Court's refusal to apply a new decision to the parties before it "is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law." *American Trucking, supra*, slip opinion, p. 21. Here, the Heimanns relied on this Court's holding in *Jacobs* to the effect that ~~the~~ federal courts would hear their claims regardless of the approval of the OCC. Judge Burciaga followed this Court's holding in *Jacobs*. Amoco ignored the *Jacobs* decision and subjected the Heimanns lands to the unit based on the OCC approval.

Of course, this Court always has the power and, indeed, the duty to overrule one of its prior opinions whenever it concludes that it does not correctly state the law. However, the rationale of all of the Supreme Court's prior decisions on retroactivity, we submit, is that litigants should be entitled to rely on decisions of the federal courts unless and *until* they are overturned. For this reason, the Supreme Court's recent statement of these principles in *American Trucking* has refined the *Chevron* factors into a simple rule of applying a decision which overrules prior case law to future conduct and events and applying prior law to past conduct and events. To apply new law to past conduct and events merely punishes those, like the Heimanns, who justifiably believed that they were entitled and required to rely on the opinions of the federal courts unless and until they are overruled. New law is given prospective effect precisely to avoid the "harsh and disruptive effect on those who relied on prior law." *American Trucking, supra*, p. 21.

POINT II

APPLYING THE CHEVRON FACTORS, THE COURT SHOULD GIVE PROSPECTIVE EFFECT TO ITS DECISION

The same result obtains if the "undistilled" *Chevron* factors are applied. Those factors are as follows:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent [sic] on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, . . . Second, it has been stressed that "we must . . . weigh the

merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

Chevron Oil, *supra* at 106-107.

These are factors to be considered on the issue of retroactivity; they are not requirements. Each factor need not compel prospective application. *Mitchell v. Mobil Oil Corporation*, 896 F.2d 463, 470 (10th Cir. 1990); *Jones v. Consolidated Freightways Corp. of Delaware*, 776 F.2d 1458, 1460 (10th Cir. 1985).

The first factor weighs in favor or prospectively. This first factor is often stated as "a clear break with precedent." *Jones v. Consolidated Freightways Corp. of Delaware*, *supra*, at 1463. See also, *American Trucking*, *supra*, at slip op. p. 14 ("clear break from prior precedent"); *Derstein v. Van Buren*, *supra*, at 656 (" 'clean break' with 'past precedent' "); *Jackson v. City of Bloomfield*, *supra*, at 654 ("clear break with prior decisions"). The amended opinion expressly overrules the *Jacobs* decision on the issue of whether the approval of the OCC is conclusive on the issue of good faith. The Court expressly circulated the opinion of the panel to all the judges of the Court in regular active service "because this panel opinion overrules Tenth Circuit precedent." Amended Opinion, p. 17, n. 8. That is customary when this Court overrules prior

precedent and considers the prospective or retroactive effect of its new decision. *See, Derstein v. Van Buren*, 828 F.2d 653, 656, n.** (10th Cir. 1987); *E.E.O.C. v. Gaddis*, *supra*, at 1377, n. 3.

The second factor consists of weighing the merits and demerits of whether retrospective operation will further or retard the purpose and effect of the rule in question. This Court has given prospective effect to its new decisions even where this factor would, by itself, weigh against prospectivity but the equities weigh in favor or prospectivity, *Jones v. Consolidated Freightways Corp. of Delaware*, or where this factor is neutral. *Jackson v. City of Bloomfield*, *supra*. Sometimes, the second factor is considered part of, and discussed with, the third factor. *See, Derstein v. Van Buren*, *supra*; *E.E.O.C. v. Gaddis*, *supra*. In *American Trucking*, the Court applied the second factor as follows:

[T]he HUE tax was entirely consistent with the *Aero Mayflower* line of cases and it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce.

Id., at 11.

In other words the "purpose" factor weighed in favor of prospectivity because (1) the rejection of the Commerce Clause claim and upholding the HUE tax was consistent with prior case law and (2) the purpose of the Commerce Clause is not to prevent states from imposing legitimate taxation in interstate commerce. Similarly in this case, this factor weights in favor of prospectivity because (1) the trial court's rejection of Amoco's collateral estoppel claim was entirely consistent with prior case law and (2)

the purpose of collateral estoppel is not to prevent legitimate litigation. The interests of promoting judicial economy, while supporting this Court's new ruling on collateral estoppel (Amended Opinion, p. 28), can be fully achieved and will not be impaired by prospective application, since the trial of the Heimanns' claims has already occurred and future cases will fall under the new rule.

Finally, the third factor requires this Court to "weigh the inequity imposed by retroactive application." *Chevron Oil, supra*, at 107. First, consider the Heimanns' side of the scales. This Court's decision in *Jacobs* was announced on October 10, 1984. One month earlier, Amoco had sued the Heimanns seeking a determination by the lower court that the Heimanns' mineral lands were included in its Bravo Dome Unit. The Heimanns understandably looked at this Court's decision in *Jacobs* for a conclusive statement of the law. This Court said that Amoco had a duty of good faith to the Heimanns and went to some length to define that duty. The Heimanns measured Amoco's conduct against the standard of good faith announced by this Court and concluded that Amoco had breached its duty of good faith. On the subject of the OCC approval, this Court said:

The fact that the receipt of the blessing of the Oil Commission does not in and of itself result in the conclusion that [the unit agreement] was valid . . . The Commission cannot by its approval establish that the area is fair to the owners of interest therein.

Jacobs, supra, at 1403.

Therefore, the Heimanns relied on this Court's statement that the OCC approval did not establish that the

unit was "fair to the owners of interest therein." Based on this Court's decision, the Heimanns felt that their rights had been violated and that they had an appropriate forum in federal court to enforce their rights. Beginning in April of 1984, and continuing after the announcement of the *Jacobs* decision and after it had sued the Heimanns, Amoco treated the Heimanns lands as if they were in the unit and paid them for approximately one-third of the actual production under their lands.

Relying almost exclusively on this Court's decision, the Heimanns "took on" Amoco Production Co. to litigate their claims. Sustained by this Court's decision, the Heimanns engaged in the *extensive* discovery, fact investigation, witness location and interviews, legal research, and trial preparation which always occur with entities of that magnitude. Judge Burciaga encouraged the Heimanns along the way by relying on this Court's "clear support" in *Jacobs* that the OCC did not decide the issue of good faith. (See, Memorandum Opinion and Order of August 27, 1986, attached hereto as Exhibit "A," pp. 6-7 [omitted from this Reply to Brief in Opposition]). This Court, in its amended opinion, recognized that Judge Burciaga "understandably relied" on *Jacobs*. (See also, *id.* at 14 "[w]e understand how the district court, relying upon the equivocal language in *Jacobs*, reasonably could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, . . . ") (Emphasis added). The Heimanns' claims were thus presented to and decided by a jury after a lengthy and fair trial, resulting in a verdict in their favor. Judge Burciaga independently decided the equitable issues in the Heimanns' favor.

After trial, Amoco appealed, and the Heimanns were confident of their position before this Court. They had a

very recent decision of this Court deciding in their favor all of the issues Amoco raised. Although this Court can and occasionally does overrule its prior decisions, it does not often do so and it even less frequently overrules a decision so recent in the absence of some significant intervening decision directly in point from a controlling jurisdiction. Continuing to rely on *Jacobs*, therefore, the Heimanns engaged in the lengthy and expensive process of the appeal.

Now, in May of 1990, this Court has determined that when it decided the *Jacobs* case, it "overlooked" pertinent law, "ignored" the proper deference owed to state administrative agencies, and was "inaccurate" in its description of the OCC approval as a mere blessing. Amended Opinion, p. 16. Of course, as stated earlier, this Court has the power and the duty to say it was wrong whenever it so determines. However, this Court can fully rectify the problems it finds in the *Jacobs* decision by giving prospective effect to its amended opinion. But given the history of this case, which was built on this Court's decision in *Jacobs*, surely this is a case where the retroactive application of the Court's new decision to the Heimanns would produce "substantial inequitable results" and "injustice or hardship." The very heart of the *Chevron Oil* and *American Trucking* line of cases is that whenever a court overrules one of its prior cases, it must not punish those who obviously relied very heavily on its prior decision.

The inequity to the Heimanns by denying prospective application far outweighs any inequity to Amoco in granting it. Even if this opinion is given prospective [sic] application, Amoco will have achieved a major victory. It will be virtually free from all claims by other lessors that

unitization projects approved by the OCC or similarly empowered agencies in other jurisdictions constitute or result from an alleged breach of Amoco's duty of good faith. Its newly-defined duty of good faith, which may arise before these agencies, will not require factual demonstrations as to individual lessors but may be met with an overall presentation that the project protects correlative rights. Surely, the efficiencies obtained as a result of this Court's decision will result in substantial economic advantages to Amoco which may well offset the cost to Amoco of prospective application of this decision. Moreover, there is nothing inequitable about applying Amoco's conduct, as found by the court and the jury, to this Court's legal standards as announced in *Jacobs* unless and until that decision is overruled by this Court

Therefore, The [sic] third *Chevron* factor must also be held to support prospective application.

CONCLUSION

Whether this Court applies the three *Chevron* factors or the new distilled standard contained in *American Trucking* based on the temporal relation of the "operative conduct and events" to the law-changing decision, the result is that prospective application will (1) accomplish this Court's purpose in rectifying its own prior analysis which it finds to have been erroneous, (2) still produce a result which will be highly favorable to Amoco by freeing it of future good faith claims from lessors once it has obtained OCC approval of its projects, and (3) avoid inflicting a severe injustice and hardship on these people who believed that they could rely on these reasons, the

Heimanns respectfully ask this Court to grant this Petition for Rehearing and to give its amended opinion prospective application.

Respectfully submitted,

JONES, SNEAD, WERTHEIM,
RODRIGUEZ & WENTWORTH, P.A.
Attorneys for the Heimanns

By /s/ Steven L. Tucker
JERRY WERTHEIM
STEVEN L. TUCKER
Post Office Box 2228
Santa Fe, New Mexico
87504-2228
(505) 982-0011

CERTIFICATE OF SERVICE

I hereby certify that I did, on the 6th day of June, 1990, cause to be hand-delivered a true and correct copy of the foregoing document to Michael B. Campbell, Esq., Campbell & Black, P.A., Jefferson Place, Suite 1, 110 North Guadalupe, Santa Fe, New Mexico 87501.

By /s/ Steven L. Tucker
STEVEN L. TUCKER
